# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

## No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

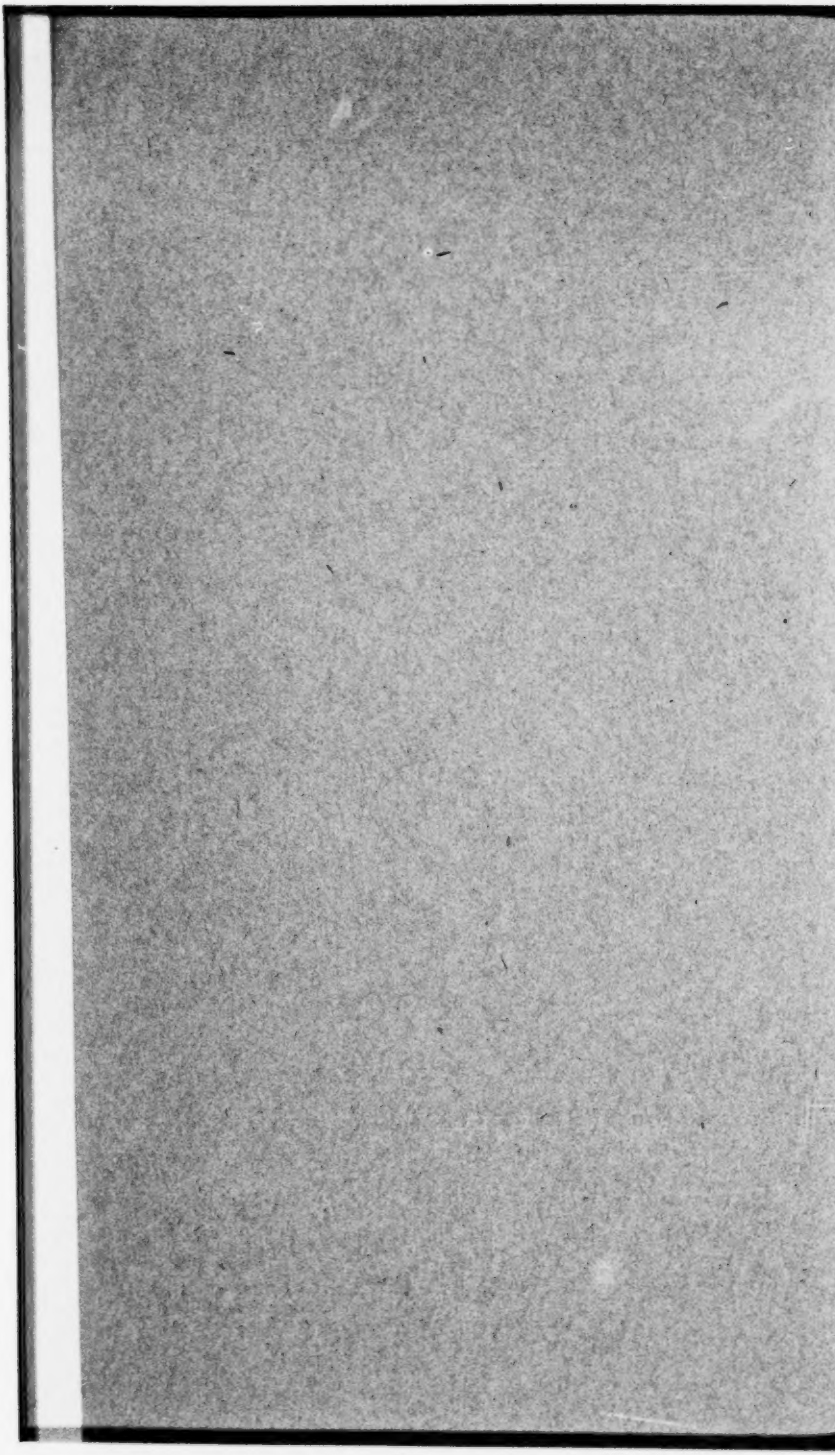
*vs.*

A. J. PARRINGTON

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED SEPTEMBER 14, 1922

(29,144)



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**Names and Addresses of Attorneys of Record.**

ARTHUR C. SPENCER, JOHN F. REILLY and CHARLES E. COCHRAN, Wells Fargo Building, Portland, Oregon,

For the Plaintiff in Error.

WILSON & GUTHRIE, Platt Building, Portland, Oregon,

For the Defendant in Error.

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**Citation on Writ of Error.**

United States of America,
District of Oregon,—ss.

To A. J. Parrington, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein The San Francisco and Portland Steamship Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of September, in the year of our

Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,
Judge. [1*]

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 28th day of September, 1921.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. L.—8748. United States District Court, District of Oregon. The San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Sep. 28, 1921. G. H. Marsh, Clerk. By ————, Deputy Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

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*Page-number appearing at foot of page of original certified Transcript of Record.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, plaintiff and defendant in error, and The San Francisco and Portland Steamship Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what

of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of September, 1921.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon. [2]

The foregoing writ of error was duly served upon the District Court of the United States for the District of Oregon, by filing a copy thereof with me as the clerk of said court on this 28th day of September, 1921.

G. H. MARSH,
Clerk United States District Court, District of Oregon.

[Endorsed]: No. L.—8748—27—193. In the U. S. Circuit Court of Appeals for the Ninth Circuit. San Francisco and Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed September 28, 1921. G. H. Marsh, Clerk United States District Court, District of Oregon.

In the District Court of the United States for the District of Oregon.

November Term, 1920.

BE IT REMEMBERED, that on the 12th day of February, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

AT LAW.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Complaint.**

Comes now the plaintiff and for cause of action against defendant alleges:

I.

That the San Francisco and Portland Steamship Company is now and during all the times hereinafter complained of was a corporation organized and existing under and by virtue of the laws of the State of Utah, and was the owner of a line of steamboats or steamships operating via the Pacific Ocean, the

Columbia and Willamette Rivers between San Francisco, in the State of California, and Portland, in the State of Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the said San Francisco and Portland Steamship Company after the [4] first day of July, 1914, which said permission was granted, and thereafter said San Francisco and Portland Steamship Company in reference to the operation of its steamships and steamboats on the line or route aforesaid between San Francisco, California, and Portland, Oregon, has been at all times subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as the railroad controlling said water carrier.

III.

That the Oregon-Washington Railroad & Naviga-

tion Company is, and at all times hereinafter mentioned has been, a railroad corporation and common carrier of freight and passengers, among other places between Portland, Oregon, and North Portland, Oregon; that at Portland, Oregon, the steamship line of the defendant connects with the line of railroad of the Oregon-Washington Railroad & Navigation Company, and the said defendant was operating said line of steamships and steamboats in connection with the line of railroad of the Oregon-Washington Railroad & Navigation Company for the continuous carriage of freight, including sugar, between San Francisco, in the State of California, to points on the line of the Oregon-Washington Railroad & Navigation Company, including North Portland, in the State of Oregon.

IV.

That heretofore and in conjunction with the Oregon-Washington Railroad & Navigation Company, the defendant filed with the Interstate Commerce Commission a schedule of rates contained in Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, Interstate Commerce Commission No. 384, and published the same, and said rates by said schedule established became [5] effective February 17, 1916; that the rate established by said schedule over the line or route of steamships of defendant from San Francisco to Portland, thence via the line of railroad of the Oregon-Washington Railroad & Navigation Company to North

Portland, in the State of Oregon, on sugar in carload lots of the minimum weight of 30,000 lbs., was and is twelve and one-half (12½) cents per hundred pounds, and was continued in force and effect by supplements thereto up to midnight of December 28, 1917, the date on which the operation and control of said lines was assumed by the United States Railroad Administration; that the rate in effect over said line or route from San Francisco to North Portland, from March 1, 1920, to August 25, 1920, as established by Special Supplement No. 14 to said Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, Interstate Commerce Commission No. 384, effective June 25, 1918, and continued in effect after the release of Federal control, was and is the sum of fifteen and one-half (15½) cents per hundred pounds, which said rate continued in effect up to and inclusive of the 25th day of August, 1920, from which date the rate has been and is the sum of nineteen and one-half (19½) cents as established by Supplement No. 8 to Oregon-Washington Railroad & Navigation Company's tariff No. 131–B, effective August 26, 1920.

V.

That during all the times from and after the 10th day of May, 1916, the defendant has charged a greater rate for the transportation of sugar in carload lots over the steamship or steamboat line from San Francisco to Portland than was charged by it in connection with the Oregon-Washington Railroad

& Navigation Company over the same route from San Francisco to North Portland, the said haul from San Francisco to Portland being included within the distance and haul from San Francisco to North [6] Portland, and in the same direction; that on all shipments of sugar hereinafter listed, carried by the defendant from San Francisco to Portland via his boat line from and after the 10th day of May, 1916, to and inclusive of the 28th day of December, 1917, the defendant has charged and collected the sum of fifteen (15) cents per hundred pounds in carload lots from San Francisco to Portland, and on all shipments moving after the first day of March, 1920, up to and inclusive of August 25, 1920, the defendant has charged and collected on all such carload shipments of sugar from San Francisco to Portland the sum of nineteen (19) cents per hundred pounds, and on all shipments moving subsequent to the said 25th day of August, 1920, the defendant has charged twenty-four (24) cents per hundred pounds.

VI.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco, to Portland, Oregon, via the line of the defendant, consigned to Wadhams & Kerr Brothers, the number of carloads on the date and of the weight shown on Exhibit "A" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as

transportation charge fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Wadams & Kerr Brothers, the number of carloads on the date and of the weight shown in Exhibit "B" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Wadhams & Kerr Brothers, the number of carloads on the date and of the [7] weight shown in Exhibit "C" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Kerr Brothers; that the said Wadhams & Kerr Brothers have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

VII.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from

San Francisco to Portland, Oregon, via the line of the defendant, consigned to Mason, Ehrman & Company the number of carloads of sugar on the date and of the weight shown in Exhibit "D" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland via the line of defendant, consigned to Mason, Ehrman & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "E" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of the defendant, consigned to Mason Ehrman & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "F" hereto attached and made a part of this paragraph, [8] on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Mason Ehrman & Company; that said Mason Ehrman & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its

right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

VIII.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "G" hereto attached, and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, via the line of defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "H" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland via the line of the defendant, consigned to Wadhams & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "I" hereto attached and made a part of this paragraph, on all of which defendant received [9] and collected as transportation charge the sum of

twenty-four (24) cents per hundred pounds; that all of said charges in this paragraph enumerated on the shipments listed were paid by Wadhams & Company; that said Wadhams & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

IX.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Co., the number of carloads of sugar on the date and of the weight shown in Exhibit "J" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "K" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from

San Francisco to Portland, Oregon, via the line of the defendant, consigned to T. W. Jenkins & Company, the number of carloads of sugar on the date and of [10] the weight shown in Exhibit "L" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by T. W. Jenkins & Company; that said T. W. Jenkins & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

X.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco, to Portland, Oregon, via the line of the defendant, consigned to Olds, Wortman & King Company the number of carloads of sugar on the date and of the weight shown in Exhibit "M" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, con-

signed to Olds, Wortman & King Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "N" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Olds, Wortman & King Company; that said Olds, Wortman & King Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and [11] claim against the defendant on all shipments shipped between the dates above specified.

XI.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company the number of carloads of sugar on the date and of the weight shown in Exhibit "O" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company, the number of

carloads of sugar on the date and of the weight shown in Exhibit "P" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Pacific Coast Biscuit Company the number of carloads of sugar on the date and of the weight shown in Exhibit "Q" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Pacific Coast Biscuit Company; that said Pacific Coast Biscuit Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified. [12]

XII.

That on the 22d day of July, 1916, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis, one carload of sugar weighing 101,688 pounds, on which defendant received and collected as transportation charge the sum of fifteen (15)

cents per hundred pounds, on which said defendant collected and received over and above the legal charge the sum of twenty-five and 42/100 dollars ($25.42); that said shipment was made on waybill No. 91, the consignor being Allen & Lewis, and was shipped by the "Beaver," voyage No. 144; that said charges were made by Allen & Lewis, and that said Allen & Lewis have heretofore for a valuable consideration, sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant therefor.

XIII.

That Astoria is on the route of said steamship company between San Francisco and Portland, and between San Francisco and North Portland, and the rates on sugar, carload lots, from San Francisco to Astoria are the same as from San Francisco to Portland; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Astoria via the line of the defendant, consigned to Ross Higgins, Mason, Ehrman Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "R" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to August 26, 1920, there was shipped from San Fran-

cisco to Astoria, Oregon, via the line of the defendant, consigned to Ross Higgins, Mason, Ehrman Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "S" hereto atached and made [13] a part of this paragraph, on all of which defendant charged and collected as transportation charge the sum of twenty-four (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Ross Higgins, Mason Ehrman Company; that said Ross Higgins, Mason Ehrman Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

XIV.

That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Astoria, Oregon, via the line of the defendant, consigned to Lang & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "T" hereto attached and made a part of this paragraph, on all of which the defendant received and collected as transportation charge the sum of fifteen (15) cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the defendant, consigned to Lang & Company, the

number of carloads of sugar on the date and of the weight shown in Exhibit "U" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of nineteen (19) cents per hundred pounds; that subsequent to the 26th day of August, 1920, there was shipped from San Francisco to Astoria, Oregon, via line of the defendant, consigned to Lang & Company, the number of carloads of sugar on the date and of the weight shown in Exhibit "V" hereto attached and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of twenty-four [14] (24) cents per hundred pounds; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Lang & Company; that said Lang & Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to said overcharge and claim against the defendant on all shipments shipped between the dates above specified.

XV.

That all of the said charges were paid by the respective consignees in the exhibits attached hereto on the date under the column heading "Date Paid," and that the overcharges on each and all of said shipments are designated in the column headed "Overcharges"; that all of said overcharges were illegally exacted and exacted contrary to the pro-

visions of section 4 of the act of Congress known as the Act to Regulate Commerce, and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments, and the defendant is indebted to the plaintiff in the full sum of said overcharges, to wit, the sum of seven thousand eight hundred sixty and 55/100 ($7,860.55), together with interest at the rate of six per cent per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest.

XVI.

That the sum of $2,000.00 is a reasonable sum to be allowed the plaintiff as attorney's fees in this action.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of seven thousand eight hundred sixty and 55/100 dollars ($7,860.55), together with interest on the respective overcharges from the date of payment thereof [15] and for the further sum of two thousand dollars ($2,000.00) as attorney's or counsel's fees, and for costs and disbursements incurred herein.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, A. J. Parrington, being first duly sworn, on

my oath depose and say that I am the plaintiff above named, that I have read the foregoing complaint, know the facts therein stated, and that the same are true as I verily believe.

A. J. PARRINGTON.

Subscribed and sworn to before me this 12th day of February, 1921.

[Seal] JAMES G. WILSON,
Notary Public for Oregon.

My commission expires September 26th, 1924. [16]

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AND AFTERWARDS, to wit, on the 8th day of March, 1921, there was duly filed in said court a demurrer to the complaint, in words and figures as follows, to wit: [40]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

**Demurrer to Complaint.**

Comes now the above-named defendant and demurs to the complaint on file herein on the following grounds:

I.

This court has no jurisdiction of the subject matter of the action.

II.

The complaint does not state facts sufficient to constitute a cause of action.

III.

That action on those claims arising prior to January 1, 1918, has not been commenced within the time limited by the Interstate Commerce Act, nor within the time limited by the 1920 Oregon laws.

In presenting the first ground of demurrer defendant will rely upon the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of actions of this character.

In presenting the second ground of demurrer this defendant will rely upon the proposition that the long and short haul clause of the Interstate Commerce Act has no application to transportation wholly by water.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JOHN F. REILLY.

Service by copy is admitted at Portland, Oregon, March 8, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed March 8, 1921. G. H. March, Clerk. [41]

---

AND AFTERWARDS, to wit, on the 4th day of April, 1921, there was duly filed in said court an opinion of the court on the demurrer to complaint, in words and figures as follows, to wit: [42]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

L.—8723.

THE PORTLAND SEED COMPANY, a Corporation,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Company),

Defendants.

**Memorandum Opinion.**

Portland, Oregon, April 4, 1921.

MEMORANDUM by BEAN, District Judge:

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland, and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points. [43]

The third case is a similar action against the Di-

rector General of Railroads, covering a shipment of alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportation to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the Court is without jurisdiction of the subject matter because exclusive original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for

a violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of like kind of property for a shorter than a longer distance over the same line or [44] route, in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeals in S. P. vs. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: One where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction. (Texas & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. vs. U. S., 215 U. S. 481; Robinson vs. B. & O., 222 U. S. 506; Mitchell Coal vs. Penn. R. R., 230 U. S. 247; Morrisdale Coal vs. Penn. R. R., 230 U. S. 304; Tex. & Pac. vs. American Tie Co., 234 U. S. 138; N. P. vs. Solum, 247 U. S. 477). The other where the act complained of is directly prohibited by statute. In such the injured party may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. vs. International Coal, 230

U. S. 184; Penn. R. R. vs. Puritan Coal, 237 U. S. 121; Penn. R. R. vs. Somner, 242 U. S. 120.)

As the long and short haul clause of the Interstate Commerce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured party may in my judgment sue without first applying to the Commission for relief.

(2) The shipments involved in two of the cases were [45] by water from San Francisco to Portland, and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which

case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension, the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.-W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions. [46]

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damage shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the Court in Phillips vs. Grand Trunk (236 U. S. 662) which lends

support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. f, 41 Stat. at L. 462) declared that "the period of federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin, in Wenatchee Produce Co. vs. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except in so far as may be inconsistent with the provisions [47] of the act or any other act applicable to federal control or with any order of the President.

It would seem, therefore, that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission

pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv. a, of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of

proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control. [48]

As the present actions could have been maintained in this court against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208–a of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates involved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

Filed April 4, 1921. G. H. Marsh, Clerk. [49]

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AND AFTERWARDS, to wit, on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the regular March term of said court—Present, the Honorable ROBERTS. S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [50]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Minutes of Court—April 4, 1921—Order Overruling Demurrer.**

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the Court being fully advised in the premises, it is ORDERED that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer.

Done and dated in open court this 4th day of April, 1921. [51]

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AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation amending complaint, in words and figures as follows, to wit: [52]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

**Stipulation Amending Complaint.**

It is hereby stipulated by and between the parties hereto by their respective attorneys as follows:

I.

That paragraph VI of the plaintiff's complaint may be amended by adding to line 3 on page 5 of the complaint after the words "Exhibit 'C' hereto attached," the words "and supplementary Exhibit 'C' attached to the stipulation amending the complaint."

II.

That paragraph VII of the complaint be amended by adding to the last line on page 5 of the complaint after the words "Exhibit 'F' hereto attached," the words "and supplementary Exhibit 'F' attached to the stipulation amending the complaint."

III.

That paragraph VIII of the complaint be amended by adding after the words "Exhibit 'I' hereto attached" in line 27 on page 6, the words,

"and supplementary exhibit 'I' attached to the stipulation amending the complaint."

IV.

That paragraph XI of said complaint be amended by adding thereto after the words "Exhibit 'L' attached hereto," in line 25 on page 7, the words "and supplementary exhibit 'L' attached to the stipulation amending the complaint."

V.

That paragraph XII of said complaint be amended by adding thereto at the end of said paragraph the following words: [53] "That between the 10th day of May, 1916, and the 28th day of December, 1917, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis the number of carloads of sugar on the dates and of the weights shown in the exhibit headed 'Supplementary Exhibit to paragraph XII of complaint' attached to the stipulation amending complaint and made a part of this paragraph, on all of which defendant received and collected as transportation charge the sum of 15 cents per hundred pounds; that between the first day of March, 1920, and the 25th day of August, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the defendant, consigned to Allen & Lewis, the number of carloads of sugar on the dates and of the weights shown in the exhibit attached to the stipulation amending the complaint and headed 'Supplementary Exhibit, Allen & Lewis' and made a part of this paragraph, on all of which defendant received and collected as transportation

charge the sum of 19 cents per hundred pounds; that all of these charges above in this paragraph enumerated on shipments listed were paid by Allen & Lewis; that said Allen & Lewis have heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right and interest in and to the said overcharge and claim against defendant on all shipments shipped between the dates above specified."

VI.

That paragraph XIV of said complaint be amended by substituting the words "Portland, Oregon," in each place where "Astoria, Oregon." is used, and that said paragraph be amended by adding after the words "in Exhibit 'V' hereto attached," in line 19 of page 11 of said complaint, the words "and supplimentary Exhibit 'V' attached to the stipulation amending complaint." [54]

It is further stipulated that the answer of the defendant as filed may appear as the answer to the complaint as herein amended.

JAMES G. WILSON,
Attorney for Plaintiff.
JOHN F. REILLY,
Of Attorney for Defendant. [55]

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AND AFTERWARDS, to wit, on the 23d day of April, 1921, there was duly filed in said court an answer, in words and figures as follows, to wit: [63]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Answer.**

Comes now the above-named defendant and for answer to the complaint on file herein, admits, denies, and alleges as follows:

I.

Admits all of the allegations contained in paragraph I.

II.

Denies each and every allegation contained in paragraph II, except that he admits Oregon-Washington Railroad & Navigation Company filed an application with the Interstate Commerce Commission for permission to continue the ownership and control of a part of the stock of said San Francisco & Portland Steamship Company, and to continue operation of the steamships of said company between San Francisco and Portland, and that its application was granted.

III.

Denies all the allegations contained in paragraph III, except that it admits that Oregon-Washington

Railroad & Navigation Company is a railroad corporation and a common carrier between Portland and North Portland.

IV.

Admits all of the allegations contained in paragraph IV, except that it denies that it was in control of said line of steamships between October 12, 1917, and March 1, 1920, and denies that during said period it maintained said or any rates. [64]

V.

Denies each and every allegation contained in paragraph V, except that it admits that from May 10, 1916, to October 12, 1917, and from March 1, 1920, up to the date of filing of the complaint, defendant's tariffs called for the differences in rates on sugar between San Francisco and Portland and San Francisco and North Portland stated in said paragraph.

VI.

Denies each and every allegation contained in paragraphs VI, VII, VIII, IX, X, XI, XII, XIII, XV, and XVI, except that defendant admits that the shipments mentioned were made and charges collected by defendant thereon on the bases stated and that Astoria is on the route of defendant between San Francisco and Portland.

And for a further, separate, and affirmative answer and defense to plaintiff's complaint, defendant alleges:

I.

That the shipment shown on Plaintiff's Exhibits "A," "B," "G," "J," "M," "O," and "T" were all

delivered and the charges thereon paid more than four years prior to the filing of the complaint herein.

And for a second further, separate, and affirmative answer and defense, defendant alleges:

I.

That the rates on sugar from San Francisco to Portland collected by defendant between February 29, 1920, and August 26, 1920, were the same rates as those shown in the tariff of United States Railroad Administration, San Francisco & Portland Steamship Company as applicable to the transportation of sugar between said points on February 29, 1920, and thereafter up to the end of Federal control of railroads, and that pursuant to an order of the Interstate Commerce Commission said rates were [65] increased August 26, 1920.

WHEREFORE, having fully answered plaintiff's complaint herein, prays that said complaint may be dismissed and that defendant have and recover its costs and disbursements incurred herein.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, C. E. Cochran, being first duly sworn, depose and say: That I am Secretary of San Francisco and Portland Steamship Company, the corporation defendant within named; that I have read the foregoing answer, know the contents thereof, and that the same is true as I verily believe.

C. E. COCHRAN.

Subscribed and sworn to before me this 23d day of April, 1921.

[Seal] JOHN F. REILLY,
Notary Public for Oregon.

My commission expires June 16, 1922.

Service by copy admitted at Portland, Oregon, April 23, 1921.

GEORGE B. GUTHRIE,
Of Solicitors for Plaintiff.

Filed April 23, 1921. G. H. Marsh, Clerk. [66]

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AND AFTERWARDS, to wit, on the 26th day of April, 1921, there was duly filed in said court a demurrer to answer, in words and figures as follows, to wit: [67]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Demurrer.**

Comes now the plaintiff in the above-entitled action and demurs to the first further, separate, and affirmative answer and defense to plaintiff's com-

plaint set out in the last four lines on page 2 of defendant's answer on the ground and for the reason that the facts stated therein do not constitute a defense to the plaintiff's complaint as referring to the shipments shown on Exhibit "A," "B," "G," "M," "O," and "T."

Plaintiff demurs to the second further, separate, and affirmative answer and defense set out on page 3 of defendant's answer on the ground and for the reason that the facts therein stated are insufficient to constitute a defense to plaintiff's complaint.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

POINTS RELIED UPON.

On the argument of said motion the plaintiff will rely upon the fact:

1.

That the period of limitation on the class of claims set forth in plaintiff's complaint is six years and is governed by section 6 of Oregon Laws of 1920 and not by the four-year limitation. [68]

2.

That the Court has passed upon the contention made by the second affirmative defense contrary to defendant's contention that the fact that rates were continued after the Railroad Administration when not legally established did not constitute said rates lawful rates of the defendant.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

I, James G. Wilson, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JAMES G. WILSON,
Of Attorneys for Plaintiff.

Service of copy admitted at Portland, Oregon, April 25, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed April 26, 1921. G. H. Marsh, Clerk. [69]

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AND AFTERWARDS, to wit, on the 27th day of June, 1921, there was duly filed in said court an opinion of the Court on the demurrer to the answer, in words and figures as follows, to wit: [70]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

June 27, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Memorandum Opinion.**

MEMO.

WILSON & GUTHRIE, for Plaintiff.

A. C. SPENCER and JOHN F. REILLY, for Defendant.

WOLVERTON, District Judge:

By its first further and separate answer, defendant pleads the statute of limitations as applying to any liability arising respecting certain enumerated exhibits; and by its second separate answer, it is shown, in effect, that the rates on sugar collected between February 29, 1920, and August 26, 1920, were the same as those shown in the tariff of the United States Railroad Administration applicable to the transportation of sugar on February 29, 1920, and thereafter up to the end of Federal control of railroads.

The sufficiency of each of these answers is challenged by demurrer.

It is agreed, that as to the statute of limitations, one or two provisions of the Oregon statute applies, depending on whether the action is upon a liability created by statute, which may be commenced within six years (sub. 2, § 6, Olson's Oregon Laws), or is one for an injury to a person or rights of another not arising on contract, which must be brought within two years (sub. 1, § 8, id.). This relates to

an action for tort. The instant action is to [71] recover an overcharge on rates of transportation.

Section 406 of the Transportation Act (41 Stat. 480) inhibits the act of charging more for a short haul than for a long haul, and section 8 of the Interstate Commerce Act (4 Fed. Stat. Ann. 430) renders the carrier liable to the person injured by such an act for the damages sustained. It is obvious, therefore, that the liability is one created by statute rather than one arising from tort.

The second separate answer is, in effect, a declaration that the rates collected between February 29, 1920, and August 6, 1920, were the same as those authorized under the Railroad Administration, and that they were legalized by the Transportation Act. The defendant having denied a violation of the Interstate Commerce Act in what it did, this answer presents an issue as to which were the legal rates. This issue can be determined on the final hearing, and will be so relegated.

The demurrer, therefore, will be sustained as to the first separate answer, and overruled as to the second.

Filed June 27, 1921. G. H. Marsh, Clerk. [72]

AND AFTERWARDS, to wit, on Monday, the 27th day of June, 1921, the same being the 97th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [73]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

June 27, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

**Minutes of Court—June 27, 1921—Order Sustaining and Overruling Demurrer in Part.**

This cause was heard by the Court upon the demurrer to the answer herein, plaintiff appearing by Mr. James G. Wilson, of counsel, and defendant by Mr. John F. Reilly, of counsel. Upon consideration whereof it is ORDERED that said demurrer be and the same is hereby sustained as to the first separate answer of the defendant and overruled as to the second separate answer of defendant herein. [74]

AND AFTERWARDS, to wit, on the 29th day of June, 1921, there was duly filed in said court, a reply, in words and figures as follows, to wit: [75]

In the District Court of the United States for the District of Oregon.

No. L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Defendant.

**Reply.**

Comes now the plaintiff and for reply to the second further separate and affirmative answer and defense set forth in defendant's answer, denies each and every allegation and the whole thereof except that this plaintiff admits that the purported schedule of rates on file at the termination of federal control purported to name on transportation of sugar from San Francisco to Portland the rates which were charged the plaintiff's assignors on shipments subsequent to February 29, 1920, and that thereafter and on August 26, 1920, the Interstate Commerce Commission passed an order increasing all rates in effect, but plaintiff denies that said purported rates on sugar so stated in said

schedule were in fact legally established, but alleges that said rates so charged were not in fact in effect and were not in fact increased to the extent asserted by said order of August 26, 1920, but that the legally established rates were the rates as alleged in plaintiff's complaint.

WHEREFORE, having fully replied, plaintiff prays judgment against defendant as prayed for in his original complaint.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, A. J. Parrington, being first duly sworn, on my oath depose and say that I am plaintiff as above named, that I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

A. J. PARRINGTON. [76]

Subscribed and sworn to before me this 27th day of June, 1921.

[Seal] RUTH SMALL,
Notary Public for Oregon.

My commission expires April 11, 1924.

Service by copy admitted at Portland, Oregon, June, 1921.

JOHN F. REILLY,
Attorney for Defendant.

Filed June 29, 1921. G. H. Marsh, Clerk. [77]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation waiving jury trial, in words and figures as follows, to wit: [78]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY,

Defendant.

**Stipulation Waiving Jury.**

It is hereby stipulated by and between the parties hereto by their respective attorneys that a jury be and is hereby waived in the trial of the above-entitled cause and that the said cause be tried before the Court without a jury.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
C. E. COCHRAN,
Of Attorneys for Defendant.

Filed July 20, 1921. G. H. Marsh, Clerk. [79]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of July, 1921, the same being the 15th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [80]

In the District Court of the United States for the District of Oregon.

L.—8748.

July 20, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY,

Defendant.

**Minutes of Court—July 20, 1921—Trial.**

Now at this day come the plaintiff by Mr. James G. Wilson, of counsel, and the defendant by Mr. C. E. Cochran, of counsel, whereupon upon motion of said parties by their respective counsel, it is ordered that this cause be and it is hereby consolidated for the purpose of trial with cause #L.—8748, entitled A. J. Parrington vs. James C. Davis.

Whereupon, this being the day set for the trial of this cause, the parties having filed a written

stipulation waiving jury trial herein, said cause comes on for trial before the Court. And the Court having heard the evidence adduced and the arguments of counsel, it is ordered and adjudged that special findings and judgment be prepared in favor of plaintiff and against defendant herein. [81]

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AND AFTERWARDS, to wit, on the 5th day of August, 1921, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [82]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Findings of Fact and Conclusions of Law.**

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the evidence having been submitted by

both parties, the Court being fully advised, does now make and find from the issues presented by the pleading and the evidence offered the following

## FINDINGS OF FACT.

### I.

That the Oregon-Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as Amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control and to continue the operation of the line of steamships and steamboats of the said San Francisco and Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad [83] & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company and that said line was being operated in the interest of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that said Oregon-Washington Railroad Navigation Company might continue the operation

of said line and the ownership of said stock subsequent to July 1, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco and Portland Steamship Company to file with the Commission all of its tariffs, rules, and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco and Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation Company its rates between San Francisco and North Portland on sugar; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the said San Francisco and Portland Steamship Company.

II.

That in and by the schedule of tariffs filed by the defendant in connection with the Oregon-Washington Railroad & Navigation Company said defendant established and put into effect a rate on sugar in carload lots of 30,000 pounds minimum from San Francisco to North Portland, which said rate so published, filed, and put in effect was twelve and one-half (12½) cents per hundred pounds at all times between February 17, 1916, to and inclusive of the 28th day of December, 1917, and was fifteen and one-half (15½) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the [84] 25th day of August, 1920, and

was nineteen and one-half (19½) cents per hundred pounds from and inclusive of August 26, 1920, until April 30, 1921; that the defendant carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments originating between the 17th day of February, 1916, and the 28th day of December, 1917, charged and collected therefor for its transportation charges at the rate of fifteen (15) cents per hundred pounds; on all shipments originating between the first day of March, 1920, and the 25th day of August, 1920, charged and collected the sum of nineteen (19) cents per hundred pounds; and that on all shipments shown in said exhibits from and after the 26th day of August, 1920, the sum of twenty-four (24) cents per hundred pounds was charged and collected; and in addition to such charges, collected and received on all of such shipments war tax at the rate of 3% of the freight charged.

III.

That all of said charges at said rates were paid by the plaintiff's assignors to the defendant, that the amount of the excess charges so collected by the defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above

what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, was and is the sum of two thousand six hundred [85] forty-eight and 64/100 dollars ($2,648.64), and the amount of such excess charges so collected by the defendant from and including the first day of March, 1920, to and including the 25th day of August, 1920, was and is the sum of two thousand six hundred eighty and 7/100 dollars ($2,-680.07), and the amount of such excess charges so collected on the shipments included in the complaint and in the stipulation amending the complaint subsequent to the 25th day of August, 1920, was and is the sum of six thousand fifty-one and 98/100 dollars ($6,051.98).

IV.

That Portland and Astoria, Oregon, are intermediate between San Francisco and North Portland on the route established by the San Francisco and Portland Steamship Company in connection with the Oregon-Washington Railroad & Navigation Company for shipments of sugar between San Francisco and North Portland, and the defendant charged and collected on all of the shipments to Portland and Astoria a greater sum than its rates established by it in connection with the Oregon-Washington Railroad & Navigation Company on shipments of sugar from San Francisco to North Portland, Oregon, said shipments moving over the same route in the same direction, and the haul from San Francisco to Portland and Astoria being included within the haul over the route so established

from San Francisco to North Portland, said excess being the amounts shown in the preceding paragraph.

V.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco and Portland Steamship Company that it would at noon on October 15, 1917, [86] requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco and Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," and that thereafter formal charters were executed on as of October 15, 1917, covering the steamships Beaver and Rose City, owned by the San Francisco and Portland Steamship Company; that on May 24, 1918, the United States Shipping Board notified the San Francisco and Portland Steamship Company as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships Beaver and Rose City, and that on and after May 29 the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VI.

That defendant during all of the time from October 15, 1917, to and inclusive of noon on the 28th

day of December, 1917, continued to issue its bills of lading on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, and collected from the plaintiff's assignors the charges for the transportation of such shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission, but continued to accept shipments and assess charges under said tariffs as so filed.

VII.

That the shippers who shipped said sugar over the [87] line of the defendant as listed on the exhibits attached to the plaintiff's complaint and the stipulation amending the complaint, have each and all assigned their claims for the overcharge assessed by the defendant against said shippers to the plaintiff herein, and he is the lawful owner and holder thereof.

VIII.

That the sum of two thousand dollars ($2,000.00) is a reasonable sum to be allowed the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fees to cover only the work with reference to said collection in this court and not on any appeal therefrom.

Upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW.

1.

That the charges assessed against the plaintiff's assignors for the transportation of sugar in carload lots from San Francisco to Portland and to Astoria

was illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the defendant having issued its bills of lading and collected the freight charges on shipments between October 15, 1917, and December 28, 1917, was liable to the shippers on [88] such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the defendant.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of eleven thousand three hundred eighty and 69/100 dollars ($11,380.69), with interest at the rate of six per cent (6%) per annum on the sum of two thousand six hundred forty-eight and 64/100 dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent (6%) per annum on the sum of two thou-

sand six hundred eighty and 7/100 dollar ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent (6%) per annum on the sum of six thousand fifty-one and 98/100 dollars ($6,051.98) from March 1, 1921, and also two thousand dollars ($2,000.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [89]

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AND AFTERWARDS, to wit, on Thursday, the 5th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [90]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Minutes of Court—August 5, 1921—Judgment.**

This matter coming on, on application of plaintiff, for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorneys, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises:

It is hereby ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant San Francisco and Portland Steamship Company, a corporation, judgment in the sum of eleven thousand three hundred eighty and 69/100 dollars ($11,380.69), together with interest at the rate of six per cent per annum on the sum of two thousand six hundred forty-eight and 64/100 dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent per annum on the sum of two thousand six hundred eighty and 7/100 dollars ($2,680.07) from the 25th day of Au-

gust, 1920, and interest at the rate of six per cent per annum on the sum of six thousand fifty-one and 98/100 dollars ($6,051.98) from March 1, 1921, and also two thousand dollars ($2000.00) as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of ——— and that execution issue therefor.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [91]

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AND AFTERWARDS, to wit, on the 21st day of September, 1921, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [92]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,
Plaintiff,

vs.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that on the 20th day of July, 1921, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E. Cochran, respectively the attorneys, and jury by a stipulation in writing filed in this Court was waived and said case tried to the Court.

WHEREUPON the following proceedings were had:

Mr. Wilson offered documentry evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action.

Mr. WILSON.—I offer in evidence the Proclamation of the President of the United States as contained in 40 Statutes at Large, at page 1733, and the following portion of said Proclamation was read:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers [93] thereto me enabling, do hereby through Newton T. Baker, Secretary of War, take possession and assume control, at 12 o'clock noon, on December 28, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the Continental

United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private carlines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon, or operated as a part of such rail or combined rail and water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that, so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interests may require, and of the usual and ordinary business and duties of common carriers."

Mr. WILSON.—I offer in evidence a copy of the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company, under the provisions of Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act in connection with the ownership of the San Francisco and Portland Steamship Company. The opinion is not certified but is reported in 34 I. C. C. 165.

Mr. COCHRAN.—We object to the document as immaterial and irrelevant in that its subject matter

has no part in the proof of plaintiff's claim against The San Francisco & Portland Steamship [94] Company, but we do not make a point upon the fact that the document appears to be uncertified and that plaintiff not being a party to the proceedings before the Interstate Commerce Commission is neither bound nor benefitted by that decision.

COURT.—Admitted, subject to objection.

(The document was marked Plaintiff's Exhibit 2 and is physically attached to plaintiff's bill of exceptions and made a part hereof.)

**Testimony of A. J. Parrington, on His Own Behalf.**

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. WILSON.

My name is A. J. Parrington; residence, Portland, Oregon; business, Traffic Attorney for about twelve years. I have been employed in the Traffic Department in various capacities with different railroads, the last with the Oregon-Washington Railroad & Navigation Company for the past twelve years. My work has consisted almost solely in the preparation and reading of tariffs. I have a map showing the location of the line of The San Francisco and Portland Steamship Company.

(This document was marked Plaintiff's Exhibit 3 for identification.)

The witness marked upon Exhibit 3 the location of Astoria with letter "A," the city of Portland

(Testimony of A. J. Parrington.)

with letter "B," and the location of North Portland with letter "C."

The route of The San Francisco and Portland Steamship Company from San Francisco to Portland is as follows:

Passing through the Golden Gate to the Pacific Ocean, thence to the mouth of Columbia River, thence into this river to Astoria, thence up Columbia River, to Willamette River, thence to Portland, Oregon. North Portland is located about five miles above the junction [95] of the Willamette and Columbia Rivers on what is called Columbia Slough.

Thereupon counsel for plaintiff inquired as follows:

Q. Is it on the route of The San Francisco and Portland Steamship Company?

Mr. COCHRAN.—I object to that as immaterial.

COURT.—Objection overruled.

To which ruling counsel for defendant excepted and its exception was duly allowed. A. It is not.

The witness then testified further that the steamers of The San Francisco and Portland Steamship Company do not stop at North Portland, nor do the tariffs of said Company name rates to North Portland. The San Francisco and Portland Steamship Company during the times referred to in the complaint was party to certain tariffs naming rates from San Francisco to North Portland. They are Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, I. C. C. No. 384, effective

(Testimony of A. J. Parrington.)

February 17, 1916. Item 445 of the tariff which names rates on sugar from San Francisco to North Portland of 12½¢ provides "via route No. 1 as shown on page 34" under the caption of "Routing" shows Route No. 1 via The San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland.

Mr. WILSON.—It is admitted in the pleadings that the Oregon-Washington Railroad & Navigation Company's line of railroad extends from Portland to North Portland.

The witness continued: Item 445 of the tariff naming rates from San Francisco to North Portland of 12½¢ for 100 pounds on sugar, carload lots, minimum weight 30,000 lbs., continued in effect from February 17, 1916, to June 24, 1918. [96] On June 25, 1918, a special supplement No. 14 to the same tariff increased the rates from 12½¢ to 15½¢. That change was authorized by the Director General of Railroads under General Order No. 28 which advanced with few exceptions all rates over the entire United States 25 per cent. The 15½¢ rate continued in effect until the expiration of the tariff July 4, 1919. Thereafter the rates were carried in the Oregon-Washington Railroad & Navigation Lines' Tariff No. 131-B, I. C. C. No. 589, effective July 4, 1919. Item 460 of that tariff continued the rate from San Francisco to North Portland of 15½¢ via Route No. 1 as shown on page 36 of the tariff. Route No. 1 as shown on page 36 of the tariff pro-

(Testimony of A. J. Parrington.)

vides that movement northbound would be via San Francisco and Portland Steamship Line, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. That rate was continued in effect up to and including August 25th, 1920. By Supplement No. 8 to the same tariff, effective August 26, 1920, the rate of 15½c was increased to 19½c. That increase is the result of the Interstate Commerce Commission decision in Ex parte 74,–58 I. C. C. Reports 220. The rates in that tariff were continued to January 15, 1921, and thereafter the same rate was carried in S. J. Henry Tariff No. 2–A, I. C. C. 35, effective January 15th, 1921.

(These tariffs were admitted in evidence and marked Plaintiff's Exhibit 4.)

STIPULATION OF COUNSEL.

It is stipulated and agreed that in making up the final record that material parts of these tariffs, as read by the witness, may be copied at length in the record with the same evidential effect as the original documents.

The witness continued: The rate on sugar from San Francisco to North Portland was [97] increased by Supplement No. 3 to North Pacific Coast Freight Bureau Tariff No. 2 I. C. C. No. 35, by S. L. Henry, Agent, from 19½c to 24c effective April 30th, 1921.

The witness continued: The rates actually charged on the sugar movement from San Francisco, California, to Portland, Oregon, was as follows:

(Testimony of A. J. Parrington.)

From May 1, 1915, to May 10, 1916, 12½¢ per 100 lbs.

From May 10, 1916, to June, 24, 1918, 15¢ per 100 lbs.

From Jne. 25, 1918, to Aug. 25, 1920, 19¢ per 100 lbs.

From Aug. 26, 1920, to Jly. 10, 1921, 24¢ per 100 lbs.

There are no shipments described in the complaint subsequent to the last mentioned date.

The witness continued: At North Portland the Swift Packing Company used sugar in pickling their meats. I understand they are large consumers. The movement of sugar by The San Francisco and Portland Steamship Company to Portland moves from San Francisco to Portland via the same boats over the same route. With respect to shipments of sugar to Astoria, the tariffs provide the same rates as to Portland during the periods covered by the tariffs hereinbefore read. Shipments to Astoria as far as they go move over the same route from San Francisco as those to North Portland.

The witness continued: I have a document which is the original shipping receipt or bill of lading issued by The San Francisco and Portland Steamship Company, dated San Francisco, December 1, 1917, issued by F. O. Schullerts, Agent, The San Francisco and Portland Steamship Company at San Francisco.

(Document offered in evidence marked Plaintiff's Exhibit 5.)

Mr. WILSON.—I have numerous expense bill receipts of The San Francisco and Portland Steamship Company subsequent to October 12, 1917. I

(Testimony of A. J. Parrington.)

offer in evidence expense bill of The San Francisco and Portland Steamship Company showing receipt of payment of transportation [98] charges on sugar issued to Mason, Ehrman & Company, December 5, 1917, being within the period which is involved in these cases.

(Document received in evidence marked Plaintiff's Exhibit 6.)

Mr. WILSON.—I have receipts representing each shipment mentioned in the complaint.

Mr. COCHRAN.—I will agree that receipts upon forms similar to Plaintiff's Exhibit 6 were issued in respect to each shipment mentioned in the complaint against The San Francisco and Portland Steamship Company. I will also agree that Plaintiff's Exhibit 6 in substance and effect may be considered as the type of those receipts without the necessity of producing the original, but I deny the legal effect claimed by counsel, and will contend that The San Francisco and Portland Steamship Company since October 12th, 1917, to May 29th, 1918, was acting solely as agent for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation pursuant to requisitions by Mr. Bainbridge Colby, Commissioner, and charter parties subsequently entered into, effective October 12th, 1917, which documents will be subsequently offered in evidence.

Q. (By Mr. WILSON.) Mr. Parrington, do you keep a file of all tariffs with reference to shipments in this locality?

(Testimony of A. J. Parrington.)

A. I have practically a complete set of tariffs covering this territory.

Q. Did you ever receive any notice, or do your tariffs show that any cancellation of the tariffs of The San Francisco and Portland Steamship Company on October 12, 1917, or any subsequent date, was made? Between that and May, 1918?

A. The San Francisco and Portland Steamship Company's northbound freight tariff No. 4 I. C. C. No. 10, was in effect at the time—at all times between August 4, 1914, and February 20, 1920.

Q. No cancellation? [99]

A. The tariff was supplemented during that time, but at no time does the Emergency Fleet Corporation, or the United States Shipping Board appear as a party to the tariff. Now does The San Francisco and Portland Steamship Company appear as agent for the United States Shipping Board Emergency Fleet Corporation.

Q. Now, Mr. Parrington, I will ask you whether or not in any of these tariffs which you have referred to as naming rates to Portland, there is contained on the title page a reference to any order of the Commission authorizing The San Francisco and Portland Steamship Company to charge more for the carriage of sugar to Portland than it participated in rates on the same commodity to North Portland?

A. It does not.

Q. Have you with you Tariff Circular 18–A of the Interstate Commerce Commission? A. I have.

Mr. WILSON—I would like to offer in evidence and

(Testimony of A. J. Parrington.)

read in evidence the requirements of the Interstate Commerce Commission with reference to showing on tariffs any authority for violation of the long and short haul clause. It is a part of Rule 77 of Tariff Circular 18–A of the rulings of the Interstate Commerce Commission, and reads as follows:

"When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distance over the same line or route, the title page of each tariff issued and filed under such authority must bear the following notations: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate [100] Commerce Order FS. No. —— of (date) 19 ——.' When the Commission has issued an order granting a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of the intermediate rate, or fares subject to the rate, title page of each tariff issued and filed under such authority, must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the interstate rates (or fares) subject to the Act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission

(Testimony of A. J. Parrington.)

Order FS. No. —— of (date) 19 ——.' Nothing in this rule may be considered as waiving any provisions of the amended fourth section of the Act to Regulate Commerce."

Cross-examination.

(Questions by Mr. COCHRAN.)

Q. Here is a document which has been marked for identification, Defendant's Exhibit "A," having the purport of being the map of Portland Harbor. I will ask you to examine the document and say if you agree with me that it is such map, and fairly and correctly represents the location of Portland Harbor—indeed, that the map is what it purports to be.

A. It is.

(The document was offered in evidence, received and marked defendant's Exhibit "A" and is attached to this bill of exceptions and made a part hereof.)

The witness continued: The scale on the map has graduated up to 4,000 feet.

STIPULATION OF COUNSEL.

It is agreed between counsel that on Defendant's Exhibit "A" the scale of the map is 2¼ inches equals 4,000 feet. [101]

The witness in respect to Defendant's Exhibit "A" further testified:

The portion of the map marked "Columbia River," and the junction of Columbia River with another river marked "Willamette River" represents the junction of these two rivers, and is the place where a steamship carrying cargo from San Francisco, via Columbia River, to Portland would depart from the

(Testimony of A. J. Parrington.)

Columbia River to enter the Willamette River. The portion marked "North Portland Harbor" is the place which I referred to in my direct examination as "Columbia Slough." North Portland is located on Defendant's Exhibit "A" as approximately 12 inches from the junction of the river, and what is shown as North Portland Harbor, and I will mark North Portland with the letter "C" which is the same description used upon Plaintiff's Exhibit 3. The lines shown upon Defendant's Exhibit "A" as "City Boundary" represents the corporate limits of the City of Portland. There is a line of railroad extending from North Portland, owned by the Oregon-Washington Railroad and Navigation Company, to a junction which is marked with the letter "J" upon Exhibit "A," and then extends over to the Willamette River in a rather westerly direction to a place called Municipal Terminal No. 4. There is also a line of railroad extending from North Portland from point "C" on Defendant's Exhibit "A" over the same route to the junction which has been marked "J," and there goes straight on south into the City of Portland up to the yards and through the terminal—to Albina Yards, which is shown on the exhibits as "O.-W. R. & N. Co. Albina Yards," and to various terminals, docks and warehouses as shown upon the map. The berth of the steamships of The San Francisco and Portland Steamship Company in Portland is Ainsworth Dock, located on the west side of the Willamette River between the Broadway and Steel Bridges. It is connected with tracts of the Northern

(Testimony of A. J. Parrington.)

Pacific Terminal Company. Transfer from ship to rail is usually at Ainsworth Dock. [102] I know where the transfers were made at Ainsworth Dock, but we don't claim transfer of this sugar.

Q. (By COCHRAN.) Do you know, as a matter of fact, that the Steamship Company unloads at any of these docks along the river from Municipal Terminal No. 4 clear up to the other Municipal Terminals on this Exhibit "A," don't you?

A. The tariffs of the company provide that the steamships will stop at one or more flour mills for cargo of a certain amount. They will not stop at miscellaneous docks for small cargo, either to take on or discharge cargo, a few carloads. They specify the number of tons for which they will call at a dock, and I believe it is in the neighborhood of 400 tons.

Q. Here is a ruler. Will you tell us the distance from the water connection with rail at Municipal Terminal No. 4 up to the Ainsworth Dock, which is marked on this Exhibit "A" as No. 57?

A. It is approximately 22 inches.

Q. Twenty-two inches upon the map. The other is approximately 12 inches?

A. Twelve inches.

Q. Now, tell us the difference from Municipal Terminal No. 4 by rail to North Portland?

A. That is a varying line and you can measure only straight; can only get an approximate distance, approximately 11 inches upon the map.

Q. Now, the distance upon the ground would be those inches multiplied by 4,000 feet?

(Testimony of A. J. Parrington.)

A. It would.

Redirect Examination by Mr. WILSON.

Q. At the various docks here in the City of Portland, to which [103] reference has been made, that the company will stop for cargo of a certain amount, which you say you think is 400 tons, does the Portland rate apply at all these docks wherever they land?

A. It does.

Q. Is there any place between the mouth of the Columbia River and the Ainsworth Dock, the regular berth of these steamers, where the rate is shown by the tariff as anything less than the Portland rate?

A. No.

Recross-examination by Mr. COCHRAN.

Swift & Company, at North Portland, do not buy sugar for the purpose of selling it to the trade. They merely use it in the pickling and preserving of their meats. There is no business at North Portland of the type of my assignors, such as Allen & Lewis, Mason, Ehrman & Company, and the Pacific Coast Biscuit Company, but the rate is there for their use if they choose to distribute from there.

Redirect Examination by Mr. WILSON.

The tariff makes no distinction between sugar for curing ham and sugar for preserving bought here in Portland. Sugar is sugar under the tariff, and it all moves under that rate, whether it is of the character they use in curing hams or the character they use for the table.

COURT.—Is North Portland Harbor, as marked

(Testimony of A. J. Parrington.)

on that map, Plaintiff's Exhibit "A," navigable for boats the size of those operated by the Steamship Company as far as North Portland?

A. I could not answer that question.

Mr. WILSON.—I think the lumber schooners go in there for the Monarch Mills.

A. I believe. I have no knowledge. [104]

Mr. COCHRAN.—Our steamers, I understand, have put in there at North Portland.

COURT.—Your steamers have? A. Yes.

COURT.—Regularly? All steamers north?

Mr. COCHRAN.—I don't think regularly, your Honor. I think probably only during high water. Mr. Mount, our Assistant General Freight Agent, tells me there is ample water for all boats drawing up to 16 feet, I think, to go up there, but our general course, however, is Willamette and Columbia Rivers, not into these sloughs.

**Testimony of James G. Wilson, for Plaintiff.**

JAMES G. WILSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows, without interrogation.

Mr. COCHRAN.—I will admit counsel is an attorney of this Court, and has had many years of experience in commerce procedure and trial of cases, and is familiar with cases of this kind.

Mr. WILSON.—I have been attorney for Plaintiff since the inception of this case. There are involved in this case a great many overcharges on separate bills. I assume there will be approximately—the

(Testimony of James G. Wilson.)

overcharges will average, perhaps $18. to $20. on each shipment. It involves the examination and preparation of a great many expense bills, bills of lading and considerable time in the preparation of the case. In addition to that, there has been involved argument on demurrer. For the preparation of that, the time involved was, I should say, ten days or two weeks. Briefs were filed, and a considerable amount of work involved with them. There is involved in this case approximately $7500.00 of overcharges, and *and* I think $1500.00 is a reasonable attorney's fee for the court to assess.

**Testimony of A. J. Parrington, on His Own Behalf (Recalled).**

A. J. PARRINGTON, plaintiff, recalled as a witness on his own behalf, testified as follows: [105]

Direct Examination.

While on the stand previously I spoke about the tariffs of The San Francisco and Portland Steamship Company providing for stopping at other wharves in the City of Portland for delivery or reception of traffic of a certain amount. I have the tariffs with me. As showing the practice of the San Francisco and Portland Steamship Company relative to picking up freight or delivering freight at outside docks other than their regular place of landing. I read from The San Francisco and Portland Steamship Company's South-Bound Local Freight Tariff No. 5, I. C. C. No. 11, under the title of "Absorption," Paragraph A:

(Testimony of A. J. Parrington.)

"When shipments of barley, flaxseed, oats, rye, wheat, or mill feed in lots of 200 tons or over are accepted, the Company may at its option, send its steamers to outside docks at Portland to receive such grain or mill feed, in which event, no charge in addition to the freight rate as shown herein will be made."

Paragraph D under the same caption reads as follows:

"On freight in carload lots, originating at points outside of Portland or Astoria, Oregon, delivered at this Company's regular place of landing in Portland or Astoria, and shipped under regular bill of lading from Portland or Astoria to San Francisco, the cost of unloading such freight from cars and charging for switching such cars from railroad to such landing at Portland or Astoria, will be assumed by this company when the tariffs providing for the absorption of such is legally on file at the Interstate Commerce Commission."

There is no provision for picking up or delivering freight at docks or landing places other than the regular landing place in the Northbound Tariff.

Cross-examination by Mr. COCHRAN.

Q. Will you refer to the tariff, northbound tariff, San Francisco [106] and Portland Steamship Company No. 4, I. C. C. No. 10, and see whether or not there is anything in that tariff which indicates

(Testimony of A. J. Parrington.)

the rates solely to the regular landing place or berth of the steamers.

A. By inference only. There is no mention of the regular landing place, but it does mention dock. By "dock" you would infer the regular dock.

Q. That is your inference. Where does it mention dock?

A. Well, in the second paragraph on third revision, page 3, under the caption of "Absorption."

Q. That is southbound tariff?

A. No, this is northbound tariff, the one you just referred to.

Q. Now, you have referred to a paragraph entitled "Absorption" on page 3, of the Northbound local freight tariff of the San Francisco and Portland Steamship Company.

A. Yes, third page. No. 3.

Q. Which reads as follows: "On freight in carload lots"—

A. Just a moment. The second paragraph I referred to.

Q. I am reading the first: "On freight in carload lots originating at points outside of San Francisco, delivered in cars at this company's regular landing place in San Francisco, and shipped under local bill of lading from San Francisco to Astoria and Portland, Oregon, the switching charges in San Francisco assessed by the California State Belt Railroad and the expense of car unloading, will be assumed

(Testimony of A. J. Parrington.)

by this company." Now, you observe nothing there that relates to Portland, do you?

A. Only shipments which are destined to Portland it covers.

Q. But there is nothing about the point of delivery in Portland being tied up specifically to a regular landing place in Portland, is there?

A. No. [107]

Q. Now, the next paragraph: "On northbound carload freight, consigned to firms located on industrial tracks, this company will, when consignees desire to take delivery by switching freight in cars from dock to warehouse, load such freight into cars free of charge." Now, there isn't a word there said about a particular landing place, is there? So if a man had freight going to North Portland, this company agrees there if he desires to switch in freight-cars to load into the freight-cars free of charge. That could be accomplished on Municipal Terminal No. 4, couldn't it? A. It could.

Q. Or any other dock, whether it was the regular landing place or not? A. It could.

Witness rests.

**Testimony of J. W. Mount, for Defendant.**

J. W. MOUNT, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. COCHRAN.

I am Assistant General Freight Agent of the

(Testimony of J. W. Mount.)

Union Pacific System, Portland, Oregon. This System includes The San Francisco and Portland Steamship Company. During Federal control of railroads I was Special Examiner for the Portland District Freight Traffic Committee of the United States Railroad Administration. I have been engaged in handling tariffs and traffic in the traffic department of the transportation companies approximately twenty years, and am acquainted with traffic matters, tariffs, their making, how the amounts of charges are arrived at, and have had experience in determining the reasonableness of rates. I am acquainted with the Steamship Company's rates from San Francisco to Portland, also the rates by rail lines from San Francisco to Portland, and have made comparisons between [108] the two. The water rate from San Francisco to Portland, carloads, on May 10, 1916, was 15 cents per 100 pounds. The rate by Southern Pacific on the same commodity from San Francisco to Portland was 20 cents per 100 pounds. The normal rate on sugar by water on this date was the fifth class rate. The normal basis of rates were departed from for different reasons, and in this particular instance the commodity rate was less than the normal class rate to meet competition of steam schooners and other lines of steamships operating between San Francisco and Portland, who do not file their tariffs with the Interstate Commerce

(Testimony of J. W. Mount.)

Commission. I have particularly in mind the steamship lines of the Parr McCormick Company. Their business is the transportation of lumber from Portland to San Francisco, but they bring cargo northbound. By operating in this manner cargo affords ballast as well as reducing operating expenses. They are permitted to make a very low rate. The rate on sugar from San Francisco to Portland via water line was really below normal and reasonable rate in that it was established to meet competitive conditions over which they had no control or over carriers which were not subject to governmental control, and who could make rates at their pleasure. There is no competition at North Portland with any of plaintiff's assignors in the line of similar business dealing in sugar at that point.

Cross-examination by Mr. WILSON.

Municipal Dock No. 4 is located at St. Johns Terminal, ordinarily referred to as St. Johns Terminal. It is on the line of Oregon-Washington Railroad & Navigation Company. Rule 20 of the San Francisco and Portland Steamship Company's Northbound Local Tariff No. 8 naming class and commodity rates from San Francisco and Portland effective August 25, 1920, reads as follows:

> "On carload freight, billed to rail points beyond Astoria or Portland, Oregon, the cost of loading such [109] freight in cars to-

(Testimony of J. W. Mount.)

gether with cost (as lawfully on file with the Interstate Commerce Commission and when such charge is not absorbed by connecting carrier) of switching such cars from this carrier's regular place of landing at Astoria or Portland to the railroad, will be assumed by this carrier."

There is a note immediately following this rule which reads as follows:

"Note: The St. Johns (or Peninsula) Tunnel and Willbridge, Oregon, will be considered hereunder a 'rail point beyond Portland, Oregon.'"

Willbridge is opposite St. Johns on the west side of Willamette River, on the line of the Spokane Portland & Seattle Railway Company. The San Francisco and Portland Steamship Company gets out circulars the same as other lines, advertising matter, that its place of leaving and landing is Ainsworth Dock, foot of Second Street, for passengers only, that is, not for freight. This circular says that Portland sailings will be from Ainsworth Dock, foot of Second Street, and I never knew them to take passengers at any other place but Ainsworth Dock, but they take freight at different places in the City of Portland. The amount of freight to be received at other places in the City of Portland is left largely to the discretion of the General Manager of the Company, but they don't obligate themselves to stop for anything less than 200 tons and that only at the

(Testimony of J. W. Mount.)

Steamship Co.'s. option. It has a right to get freight at all points in the city at its option. The tariffs make the broad statement that the rates apply between San Francisco and Portland, and, of course, Portland includes a large terminal territory, but it does not include North Portland. The San Francisco and Portland Steamship Company does not publish any rate to North Portland except it is a party to tariffs naming rates to North Portland in connection with rail haul transferred at Portland.

Redirect Examination by Mr. COCHRAN.

The situation, summing it up, is that the tariffs recite charges on sugar, for example, The San Francisco and Portland Steamship Company's [110] haulage from San Francisco to Portland without stating in these tariffs as to what part of Portland it will be received or delivered. The combination tariffs filed by Oregon-Washington Railroad & Navigation Company on behalf of itself and of the Steamship Company, which have been referred to here as being in effect during the time the various shipments moved between San Francisco and North Portland plainly says San Francisco and Portland Steamship Company, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. These tariffs would be complied with on a shipment moving from San Francisco to North Portland if the Steamship Company shall have passed the traffic over Municipal Terminal No. 4 as a connection between water and rail line bound for North Port-

(Testimony of J. W. Moun )

land. There is a line of railroad extending from North Portland to Municipal Terminal No. 4 owned by the Oregon-Washington Railroad & Navigation Company, and likewise a line of railroad from North Portland up into the business section of Portland around the Albina Yards and across the Willamette River by a railroad bridge to a connection with the tracks of the Northern Pacific Terminal Company in Portland, and thence to the Ainsworth Dock on the west bank of the Willamette River. The distance from San Francisco to North Portland via Municipal Terminal No. 4 is shorter than the distance from San Francisco to the Ainsworth Dock in Portland, Oregon, although it is possible because of the tracks being physically laid that way for traffic if any shall have moved from San Francisco to North Portland to come over the Ainsworth Dock, that is, come up by water to the Ainsworth Dock, pass over the dock to rail connection, and thence to North Portland, and the same movement is possible if traffic shall have still moved from Municipal Terminal No. 4.

(The witness then examined Defendant's Exhibit "A" for the purpose of identifying it a little stronger than was done by the witness Parrington.) [111]

Defendant's Exhibit "A" contains a legend index to Port facilities. No. 2 in this index refers to "Portland Municipal Terminal No. 4, Grain Elevators, etc.," and upon the map in a small circle at

(Testimony of J. W. Mount.)

Municipal Terminal No. 4 is a figure 2. Likewise on the map are a number of small circles with figures therein which will furnish an index to ascertain the name of the facility to which the figures refer. Ainsworth Dock is marked "No. 57," and by finding the figures 57 in a circle upon Exhibit "A" will give us the location of Ainsworth Dock. The red line extending from North Portland south, which crosses the Willamette River, and marked "Spokane, Portland & Seattle Railroad" correctly shows the relative location of that line. Summing up the situation, North Portland is more distant from San Francisco than Portland by a route passing from Ainsworth Dock, and it is less distant by a route passing over Municipal Terminal No. 4, and the tariffs in effect at the time of the movement of these various shipments mentioned in the complaint permit either movement, that is, via Ainsworth Dock to rail connection, or via Municipal Terminal No. 4 to a rail connection.

Recross-examination by Mr. WILSON.

As far as the tariffs are concerned and as far as the rates are concerned, it is possible for every shipment moving by The San Francisco and Portland Steamship Company and thence by Oregon-Washington Railroad & Navigation Company to North Portland to move through the Ainsworth Dock.

Thereupon Mr. Wilson asked witness the following question:

Q. And that would be the natural and customary route, would it not?

(Testimony of J. W. Mount.)

Mr. COCHRAN.—I object to that as immaterial. We have a law question involved as to whether Portland is intermediate to North [112] Portland.

COURT.—That is a question of fact, isn't?

Mr. COCHRAN.—A question of fact, yes, but it is to be determined not by what is possible. There are no shipments from San Francisco to North Portland.

COURT.—He can answer the question.

(To which ruling defendant excepted, and his exception was duly allowed.)

A. I will answer it by saying yes.

The municipal authorities of the City of Portland operating Municipal Dock No. 4 do not file tariffs with the Interstate Commerce Commission. They simply publish a wharf charge not subject to the Act to Regulate Commerce.

Thereupon the following questions and answers were given:

Q. If The San Francisco and Portland Steamship Company, in connection with the Oregon-Washington Railroad & Navigation Company, was moving over the Municipal Dock, does it publish any charge in connection with use of the Municipal Dock? Or does it absorb it?

A. Municipal Dock?

Q. Yes, No. 4.

A. I have just stated I am not familiar with their tariffs because they change oftener than the moon does.

(Testimony of J. W. Mount.)

Q. I am asking you the O.-W. R. & N. tariff under which you say it could move through the Municipal Dock—I am asking you whether or not in the O.-W. R. & N. Company, or The San Francisco and Portland Steamship Company publishes anything in regard to the use of the terminal, or the taking of the stuff over the terminal? A. Yes.

Q. What is it?

A. If the through rate includes any—if we have a through rate [113] published from San Francisco to Portland, it would include the charges at Municipal Dock Terminal No. 4.

Q. Does it publish anything? You know there is a charge made there for every ton that goes over the Municipal Dock. The City gets a charge on it.

A. They get a charge from somebody, yes, but on a through rate from San Francisco to Portland, or San Francisco to North Portland via Municipal Dock No. 4, the O.-W. R. & N. Company would have absorbed that charge.

Q. They don't publish any such absorption, do they?

A. The through rate is the absorption itself.

Q. But do they publish they will absorb any such charge?

A. Well, the rate itself includes it. We couldn't publish a rate—we don't say will be any charge. That is the way we publish the rate, we publish it through.

Q. All right. Then you say your tariff does not

(Testimony of J. W. Mount.)

publish the absorption of any charge at the Municipal Wharf?

A. No, sir; I don't say so. I say that the rate itself includes that charge. When you publish a through rate between two points, that means we have to perform the service to get from that one point to the other; that is self-evident. If you were shipping freight and paying freight charge, and the tariff was a rate from San Francisco to North Portland of say, 15 cents per hundred, you would not pay more, and we couldn't collect more. We can only collect what we file with the Commission.

Q. If the City of Portland publishes this charge, somebody has to pay.

A. If we in our tariff say we will handle a shipment from San Francisco to North Portland for 15 cents, not going to charge wharfage or switching or anything; that includes all service performed. [114]

Q. Do you publish the fact in your tariff you will absorb any charge at the Municipal Wharf for any tonnage that goes across the wharf?

A. You mean do we by specific expressions say that?

Q. Yes, I do.

A. We don't come out and specially say so, because we don't have to, and because—

Q. That is a matter of law whether you have to or not.

A. Let me finish my answer. As an expert tariff man for the past 12 or 15 years, it has been my prac-

(Testimony of J. W. Mount.)

tice when I publish a through rate from one point to another, that includes all service incident to getting that traffic from Point A to Point B, for instance.

Q. You don't specifically publish, however, in case it goes over the Municipal Dock that you will absorb that charge?

A. It is so stated when you publish the rate.

Q. But you do have facilities whereby you can handle it over your own property, don't you?

A. Yes, we could do it.

Q. And that is the way you ordinarily do it, isn't it? A. Not altogether.

The witness continued: All sugar going on the Oregon-Washington Railroad & Navigation Company's line coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically sugar can transfer from water to rail at Municipal Dock No. 4, and that it is just as good if not a better physical connection than at Ainsworth Dock.

**Testimony of Charles E. Cochran, for Defendant.**

CHARLES E. COCHRAN, attorney for defendant, called as a witness on behalf of defendant testified as follows, without interrogatories: [115]

Mr. COCHRAN.—I am Secretary of The San Francisco and Portland Steamship Company, and have been such since about August, 1918. I have been, however, since 1912, one of the attorneys for this company and have handled its business in con-

(Testimony of Charles E. Cochran.)

nection with these contracts, and the like, and am acquainted with its relationship with the United States Shipping Board. I have in my hand a telegram having the purport of being dated October 12, 1917, from Washington, D. C., addressed to The San Francisco and Portland Steamship Company, signed by Bainbridge Colby, Commissioner. This tele gram is a part of the records and files of The San Francisco and Portland Steamship Company, and I have been acquainted with it since the time of its receipt in 1917 till the present time. I offer the document in evidence, and ask to have it marked as Defendant's Exhibit "B," and would like to substitute copy and withdraw the original, so that the copy may have the same force and effect as the original.

Mr. WILSON.—I object to the offer on the ground that the telegram is irrelevant and immaterial to this controversy. I don't object to the fact that the telegram is not identified, if Mr. Cochran says it is the original telegram.

Mr. COCHRAN.—It is the original telegram.

COURT.—It will be admitted subject to your objection.

Exception saved.

(Marked Defendant's Exhibit "B.")

Mr. COCHRAN.—(Reading:)

"Washington, D. C., October 12, 1917.

**Defendant's Exhibit "B."**

San Francisco & Portland SS. Co.,
Pier 40, San Francisco, California.

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below, and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon. [116]

1. The ships affected by said requisition and included therein are (A) all cargo ships able to carry not less than 2,500 tons total dead weight, including bunkers, water and stores.

(B) All passenger steamers of not less than 2,500 tons gross register.

2. (A) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inland cargo and ship is put in ordinary good condition.

(B) As to steamers which have started to load their outward cargo requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

4. Steamers that are occupied in trades between

foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (A) Owners whose steamers are operating in the irregular trades are to continue the operations of their steamer for account of the Government as they have been doing for themselves, until they received further instructions.

(B) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers. Asknowledge.

(Signed) BAINBRIDGE COLBY,
Commissioner."

Mr. COCHRAN.—Now, the steamer "Rose City" had a capacity of 2,800 tons dead weight, and the steamer "Beaver" was 2,500 tons dead weight. [117] When that telegram was received, Mr. Blair, our general manager, turned the ships over to the Government, and began operating for the Government, pursuant to the last paragraph, pursuant to Paragraph 5–A of the telegram, directing owners whose steamers are operating in their regular trade to continue operation of their steamers for account of the Government as they have been doing for themselves, until they received further instructions. The steamers were thus operated until the month of January, 1918, when the United States Shipping

Board and The San Francisco and Portland Steamship Company signed up a requisition.

Mr. WILSON.—I would like an objection and exception to all of this.

COURT.—Yes.

Mr. COCHRAN.—A requisition charter-party of which I have in my hand the originals. Each boat was made the subject of a requisition charter, and I would like to offer these charter-parties in evidence, substituting copies for the originals, and withdrawing the originals, the copies to have the force and effect the originals would have.

Mr. WILSON.—I object to the offer on the ground the same are immaterial and irrelevant to this controversy.

COURT.—Admitted subject to your objection.

Mr. COCHRAN.—I would like to have them marked respectively, that of the steamer "Beaver," "C," and that of the "Rose City," "D."

(Marked Defendant's Exhibit "C" and "D.")

Mr. COCHRAN.—The part of which to which I specially desire to direct your attention reads as follows: "This requisition charter made and concluded upon in the District of Columbia the 14th day of January, 1918, between the San Francisco and Portland Steamship Company of Utah, owner of the good American single-screw steamship 'Beaver' of San Francisco, of 4507 tons gross register, and 2279 tons net register," etc. * * * "Witnesseth:

Whereas, by requisition order dated October 12, [118] 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, United States has requisitioned the use of the steamship 'Beaver' and the steamship has been delivered into the possession of the United States pursuant to the requisition; and

Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner of the use of the steamship so requisitioned. and to define by agreement the rights and duties of the United States, and of the owner with respect to the operation of the vessel under the requisition, and in respect to other matters in connection therewith;

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'Time Form' hereto annexed."

Now, on the second page of the charter-party is the time form and the part I desire to refer to recites as follows:

"Whereas, the United States has determined to deliver possession of the vessel to the owner, to be operated by the owner for the United States";

And again, Paragraph second on the same page which reads:

"The owner shall operate the vessel for the United States, shall provide and pay for all provisions," etc.

Now, when these documents were signed, they were signed by Mr. Farrell, the President of the Steamship Company. As a matter of fact they were signed a few days before the 14th of January, and then sent back to Washington, and then they were—these two returned, and have been in the files of the company ever since. I am acquainted with Mr. Farrell's signature, and the name here, J. D. Farrell, is his signature. [119]

Now, the operations continued under that charter-party, these charter-parties, that is Exhibits "C" and "D" until the 29th day of May, 1918, when The San Francisco and Portland Steamship Company received from the Shipping Board the following telegram, which I desire to offer in evidence, and have marked and substitute a copy for the original, and withdraw the original, the copy to have the same force and effect as evidence as the original would have.

Telegram marked Defendant's Exhibit "E" and read as follows: ,

**Defendant's Exhibit "E."**

"Washington, D. C., May 24, 1918.

San Francisco & Portland Steamship Company,
Pier 40, San Francisco, California.

Five days notice is hereby given of the cancellation of requisition charter on Steamships 'Beaver'

and 'Rose City' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to such vessels.

UNITED STATES SHIPPING BOARD."

Mr. COCHRAN.—This was received by our general manager, according to the notation in the evening, 6:25 P. M. May 24th. I call your attention to Paragraph third, Page 1 of the charter-party, of these exhibits "C" and "D," which reads as follows:

"Third: Upon giving five days' written notice to the owner United States may at any time when the vessel is in a United States port cancel this requisition charter without prejudice to the approved rights of either party."

Now, when Defendant's Exhibit "E," the telegram from United States Shipping Board cancelling the requisition charter was received, The San Francisco and Portland Steamship Company was a little bit up in the air whether they were under Federal control or whether the company itself would have to operate it. The matter was taken up with Mr. C. R. Gray, director of the division of operation of the United States [120] Railroad Administration, and finally he constituted his organization for the purpose of operating the boat—operating the "Rose City." The steamer "Beaver" having been in the meantime commandeered by the United States Navy. So Mr. Gray wrote a letter to Mr. Farrell, President of the Oregon-Washington Rail-

road & Navigation Company, the original of which is in our files, but which I would like to retain in the files, and substitute a copy, and the document which I have and will ask to be marked is such copy, and I personally know that to be a copy.

Mr. WILSON.—Objected to as irrelevant and immaterial.

COURT.—Admit it, subject to your objection.

Mr. WILSON.—Save an exception.

(Marked Defendant's Exhibit "F.")

**Defendant's Exhibit "F."**

"July 12, 1918.

President.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General.

Division of Operation,

C. R. GRAY, Director.

Interstate Commerce Building,

Washington.

At San Francisco, July 11, 1918.

Mr. J. D. Farrell,

President, Oregon-Washington Railroad & Navigation Company, Portland, Oregon.

My dear Sir:

The operation of the ships and facilities of The San Francisco and Portland Steamship Company for the United States Railroad Administration will be placed under the jurisdiction of Mr. J. P.

O'Brien, General Manager, Oregon-Washington Railroad & Navigation Company.

Mr. G. L. Blair as general manager of The San Francisco and Portland Steamship Company will continue in charge of the same as general manager, reporting to Mr. O'Brien.

The Shipping Board have definitely decided that they will not [121] charter the SS. 'Alvarado,' but are favorably disposed towards chartering the SS. 'Blandon,' and an effort is now being made by wire to definitely charter this vessel for a two months' trial period on the bare boat basis, and if chartered, this boat will be turned over to Mr. Blair for freight operation between Portland and San Francisco.

Yours very truly,

(Signed) C. R. GRAY."

Mr. COCHRAN.—Now, the charter-parties, Defendant's Exhibits "C" and "D," make reference to the President's Executive Order of the 11th of July, 1917. I assume the Court will take judicial knowledge of that order, but for the purpose of refreshing the memory of the Court, it reads as follows:

"By virtue of authority vested in me in the section entitled 'Emergency Shipping Fund,' of an Act of Congress entitled 'An Act making Appropriation to supply Urgent Deficiencies in Appropriations for the Military and Naval Establishments

on account of War Expenses for the Fiscal Year ending June 30th and for other purposes," approved June 15, 1917. I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said Act insofar as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials and ship construction.

And I do further direct that United States Shipping Board shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to, and in furtherance of the taking over of title or possession, by purchase or requisition, of [122] constructed vessels or parts thereof, or charters therein; and the operation, management and disposition of such vessels and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board, or by it through the United States Shipping Board Emergency Fleet

Corporation, or through any other corporation organized by it for such purpose.

(Signed) WOODROW WILSON,

The White House, 11 July, 1917."

It is Government Document No. 2664.

Mr. WILSON.—The San Francisco and Portland Steamship Company never cancelled its tariff for shipments between San Francisco and Portland.

Mr. COCHRAN.—Well, I don't know, I am sure, but my understanding is that everything went right on as before.

Mr. WILSON.—The "Rose City" and "Beaver" continued to operate between San Francisco and Portland during this entire period?

Mr. COCHRAN.—Yes; there was no cessation of the movement of the boats.

Mr. WILSON.—And they continued to handle shipments tendered to the agent at San Francisco, the same as before that time.

Mr. COCHRAN.—Yes, they did just as the telegram, this Exhibit "B" said to do, namely, to operate their regular trades — operate in their regular trades, and the company did continue the operation of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.

Mr. WILSON.—And the company issued its own bills of lading?

Mr. COCHRAN.—Well, the form will show here.

On these [123] forms, now, it has been my observation throughout the Railroad Administration as well as the steamship operation, that the stationery, such as the forms of bills of lading, waybills, expense bills, and other forms in use in the handling of traffic, were used precisely the same after Government control, as before Government control. But I don't consider that it made a corporation contract because the Government used that form.

(Defendant's Exhibits "C" and "D," being respectively charter-parties of the steamers "Rose City" and "Beaver" to United States Shipping Board, are hereto attached and made a part of this bill of exceptions.)

Mr. COCHRAN.—I desire to request special findings in this case in favor of the defendant. I desire also a special finding if your Honor shall find for plaintiff in any amount, excluding all computation for damages in respect to all shipments which moved to Portland because it is not shown that on the Portland shipments, either on the line or route outlined by the tariff, or by the line or route, or by any line geographically considered, that Portland is intermediate to North Portland. I urge this finding upon the grounds further, as stated in the demurrer to the complaint, and among which may be mentioned that this Court has no jurisdiction of the subject matter of this action.

That jurisdiction is lodged solely in the Interstate Commerce Commission, and complaint in this case fails to state facts sufficient to constitute a cause of action.

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the Court a request for findings and judgment for the plaintiff in the manner following: [124]

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney James G. Wilson of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the evidence having been submitted by both parties, the Court being fully advised, does now make and find from the issues presented by the pleading and the evidence offered the following

## FINDINGS OF FACT.

### I.

That the Oregon, Washington Railroad & Navigation Company, pursuant to Section 5 of the Act of Congress known as the Act to Regulate Commerce as Amended by the Act of Congress of August 24th, 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as

the owner of the stock of the San Francisco & Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the said San Francisco & Portland Steamship Company between San Francisco and Portland after the 1st day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon, Washington Railroad & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company and that said line was being operated in the interests of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that said Oregon, Washington Railroad & Navigation Company might continue the operation of said [125] line and the ownership of said stock subsequent to July 1st, 1914; that said Interstate Commerce Commission in said order granting permission also ordered the San Francisco & Portland Steamship Company to file with the Commission all of its tariffs, rules and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco & Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon,

Washington Railroad & Navigation Company its rates between San Francisco and North Portland on sugar; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the said San Francisco & Portland Steamship Company.

II.

That in and by the schedule of tariffs filed by the defendant in connection with the Oregon, Washington Railroad & Navigation Company said defendant established and put in effect a rate on sugar in carload lots of 30,000 pounds minimum from San Francisco to North Portland, which said rate so published, filed, and put in effect was twelve and one-half (12½¢) cents per hundred pounds at all times between February 17th, 1916, to and inclusive of the 28th day of December, 1917, and was fifteen and one-half (15½¢) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 25th day of August, 1920, and was nineteen and one-half (19½¢) cents per hundred pounds from and inclusive of August 26th, 1920, until April 30th, 1921; that the defendant carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco [126] and Portland, and all shipments of sugar from San Francisco to

Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments originating between the 17th day of February, 1916, and the 28th day of December, 1917, charged and collected therefor for its transportation charges at the rate of fifteen (15¢) cents per hundred pounds; on all shipments originating between the 1st day of March, 1920, and the 25th day of August, 1920, charged and collected the sum of nineteen (19¢) cents per hundred pounds; and that on all shipments shown in said exhibits from and after the 27th day of August, 1920, the sum of twenty-four (24¢) cents per hundred pounds was charged and collected; and in addition to such charges, collected and received on all such shipments war tax at the rate of 3% of the freight charged.

III.

That all of said charges at said rates were paid by the plaintiff's assignors to the defendant, that the amount of the excess charges so collected by the defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, was and is the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64), and the amount of such excess charges so collected by the defendant from and

including the 1st day of March, 1920, to and including the 25th day of August, 1920, was and is the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07), and the amount of such excess charges so collected on the shipments included in the complaint and in the stipulation amending the complaint subsequent to the 25th day of August, 1920, was and is the sum of Six Thousand Fifty-one and 98/100 Dollars ($6,051.98). [127]

IV.

That Portland, and Astoria, Oregon, are intermediate between San Francisco and North Portland on the route established by the San Francisco & Portland Steamship Company in connection with the Oregon, Washington Railroad & Navigation Company for shipments of sugar between San Francisco and North Portland, and the defendant charged and collected on all of the shipments to Portland and Astoria a greater sum than its rates established by it in connection with the Oregon, Washington Railroad & Navigation Company on shipments of sugar from San Francisco to North Portland, Oregon, said shipments moving over the same route in the same direction, and the haul from San Francisco to Portland and Astoria being included within the haul over the route so estabished from San Francisco to North Portland, said excess being the amounts shown in the preceding paragraph.

V.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco & Portland Steamship Company that it would at noon on October 15th, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water and stores, and all passenger steamers of not less than twenty-five hundred tons gross register and also notified said San Francisco & Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," and that thereafter formal charters were executed as of October 15th, 1917, covering the steamships "Beaver" and "Rose City," owned by the San Francisco & Portland Steamship Company; that on May 24th, 1918, the United States Shipping Board notified the San Francisco & Portland Steamship Company as follows: "Five [128] days' notice is hereby given of the cancellation of the requisition charter on the steamships "Beaver" and "Rose City," and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VI.

That defendant during all of the time from October 15th, 1917, to and inclusive of noon of the

28th day of December, 1917, continued to issue its bills of lading on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, and collected from the plaintiff's assignors the charges for the transportation of such shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission but continued to accept shipments and assess charges under said tariffs as so filed.

VII.

That the shippers who shipped said sugar over the line of the defendant as listed on the exhibits attached to the plaintiff's complaint and the stipulation amending the complaint, have each and all assigned their claims for the overcharge assessed by the defendant against said shippers to the plaintiff herein, and he is the lawful owner and holder thereof.

VIII.

That the sum of Two Thousand ($2,000.00) Dollars is a reasonable sum to be allowed the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fees to cover only the work with reference to said collection in this court and not on any appeal therefrom.

Upon the foregoing findings of fact the Court makes the following: [29]

CONCLUSIONS OF LAW.

I.

That the charges assessed against the plaintiff's

assignors for the transportation of sugar in carload lots from San Francisco to Portland and to Astoria was illegal and in violation of the amended Fourth Section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland over the line of the San Francisco & Portland Steamship Company and the Oregon, Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the defendant, having issued its bills of lading and collected the freight charges on shipments between October 15th, 1917, and December 28th, 1917, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the defendant.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of Eleven Thousand Three Hundred Eighty and 69/100 Dollars ($11,380.69), with interest at the rate of six per cent

(6%) per annum on the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent (6%) per annum [130] on the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent (6%) per annum on the sum of Six Thousand Fifty-one and 98/100 Dollars ($6,051.98) from March 1st, 1921, and also Two Thousand Dollars ($2,000.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this —— day of July, 1921.

And thereupon Mr. Cochran, as attorney for defendant, submitted in writing to the Court the following objections to findings of fact and conclusions of law proposed and requested by the plaintiff:

## OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the defendant and objects and excepts to certain findings of fact and conclusions of law requested by plaintiff in the manner following, that is to say:

I.

Defendant objects to Finding of Fact I, alleging said finding to be immaterial for that the San Francisco and Portland Steamship Company, and its operations by water are not in any respect subject

to the Act to Regulate Commerce, nor does the Fourth Section of said Act to Regulate Commerce apply thereto, nor does the Act of Congress of August 24, 1921, entitled, "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the Sanitation and Government of the Canal Zone," commonly known as the "Panama Canal Act" subject said company and its operations to the regulations of the Act to Regulate Commerce.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was [131] duly allowed.

II.

Defendant objects and excepts to Finding of Fact II alleging same to be immaterial to any proper or legal issue in this case.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

III.

(a) Defendant objects and excepts to all that portion of Finding of Fact III reciting that excess charges collected by defendant from the plaintiff's assignors between the 17th day of February, 1916, to and inclusive of noon of the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland was the sum of $2,648.64, for the reason that if said charges were

collected recovery thereof is barred by the Statute of Limitations, since the cause of action did not accrue thereon within two years immediately prior to the filing of the complaint herein, and plaintiff's remedy, if any, thereon has been barred by law.

(b) Defendant objects to the remainder of the said Finding of Fact III alleging same to be immaterial to any proper or legal issue in this case, and for the further reason that defendant from the 15th day of October, 1917, to the 29th day of December, 1917, was operating its boats solely as agent for the United States Shipping Board.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed. [132]

IV.

Defendant objects and excepts to Finding of Fact IV, as proposed by plaintiff, for the reason same is not supported by the evidence, particularly with respect to that portion of the findings which recites Portland as intermediate between San Francisco and North Portland.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

V.

Defendant objects and excepts to Finding of Fact VI for the reason that bills of lading issued for shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint

and other contracts of carriage of said freight were, in effect, made as agent for the United States Shipping Board, and not upon its own behalf as principal that the said United States Shipping Board was principal in said transactions, all of which the plaintiff well knew.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

VI.

Defendant objects and excepts to Finding of Fact VIII, and particularly to that part allowing attorneys' fees for the collection of said alleged overcharges, and avers that since there were no overcharges no attorneys fees can be properly allowed.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed. [133]

VII.

Defendant objects and excepts to Conclusion of Law I, to the effect that the charges collected from plaintiff's assignors were legal and in violation of the amended Fourth Section of the Act to Regulate Commerce, and alleges a proper conclusion of law to be that defendant only collected charges on sugar from the 17th day of February, 1916, to and inclusive of the 15th day of October, 1917, and from the 1st day of March, 1920, to the 25th day of August, 1920, and then only at the proper legal and valid tariff rates, and that the cause of action of

plaintiff, if any he has, in respect to the charges collected on shipments from the 17th day of February, 1916, to the 28th day of December, 1917, did not accrue within two years prior to the commencement of the action, and is therefore barred by law.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

VIII.

Defendant objects and excepts to Conclusion of Law II, alleging same to be erroneous.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

IX.

Defendant objects and excepts to Conclusion of Law III, alleging same to be erroneous, and that a proper conclusion to be drawn from the facts is that defendant is not liable to plaintiff in any amount.

The Court overruled said objection, to which ruling of the [134] Court counsel for the defendant excepted and his exception was duly allowed.

X.

Defendant objects and excepts to Conclusion of Law IV alleging same to be erroneous, and that a proper conclusion is that defendant is entitled to judgment against the plaintiff for its costs and disbursements.

The Court overruled said objection, to which rul-

ing of the Court counsel for the defendant excepted and his exception was duly allowed.

XI.

Defendant objects generally to a judgment in favor of the plaintiff for any sum of money, and requests a judgment in favor of defendant for the reason that the testimony properly supports such judgment.

The Court overruled said objection, to which ruling of the Court counsel for the defendant excepted and his exception was duly allowed.

The Court thereupon signed the findings of fact and conclusions of law requested by the plaintiff and ordered same filed as the decision of the Court in said cause, to which ruling of the Court counsel for the defendant excepted and exception was duly allowed, whereupon a judgment was entered for the plaintiff and against the defendant as follows:

This matter coming on, on application of plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, its attorney, the Court having heretofore filed its findings of fact and conclusions of law, [135] and being fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant San Francisco & Portland Steamship Company, a corporation, judg-

ment in the sum of Eleven Thousand Three Hundred Eighty and 69/100 Dollars ($11,380.69), together with interest at the rate of six per cent per annum on the sum of Two Thousand Six Hundred Forty-eight and 64/100 Dollars ($2,648.64) from the 29th day of December, 1917, interest at the rate of six per cent per annum on the sum of Two Thousand Six Hundred Eighty and 7/100 Dollars ($2,680.07) from the 25th day of August, 1920, and interest at the rate of six per cent per annum on the sum of Six Thousand Fifty-one and 98/100 ($6,051.98) Dollars from March 1st, 1921, and also Two Thousand Dollars ($2,000) as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of Eighteen 26/100 Dollars, and that execution issue therefor.

Done and dated in open court this 5th day of August, 1921.

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above-entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above-entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with the rulings of the Court on the questions of law

presented, and that exceptions taken by the defendant therein were duly taken and allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed [136] by the rules of this Court as extended by stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above-entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

Due legal service of the within bill of exceptions prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 17th day of September, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 21, 1921. G. H. Marsh, Clerk. [137]

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AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [138]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Petition for Writ of Error.**

The San Francisco and Portland Steamship Company, a corporation, defendant in the above-entitled action, conceiving itself aggrieved by the final order and judgment of this Court made and entered against it and in favor of the plaintiff on the fifth day of August, 1921, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto and the rulings of the court thereon as set forth in its assignments of error filed herein, petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in the behalf made and provided;

And also that an order be made fixing the amount of security which the defendant shall give and fur-

nish in said writ of error and that upon giving such security all further proceedings in *the be* stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage of the defendant herein.

The defendant has filed herewith its assignments of error upon which it relies and will urge in the said United [139] States Circuit Court of Appeals.

WHEREFORE defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of and that a transcript of the record of proceedings, papers, and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in its answer.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [140]

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AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [141]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Assignments of Error.**

Comes now the defendant above named, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorney of record, and says that the judgment and final order of this court, made and entered in the above-entitled court on the 5th day of August, 1921, in favor of the plaintiff above named and against the defendant above named, is erroneous and against the just rights of the defendant, and files herein together with his petition for writ of error from said judgment and order the following assignments of error which he avers occurred upon the trial of said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint.

II.

The Court erred in admitting in evidence over the objection and exception of defendant the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company under the provision of section 5 of the Act to regulate Commerce as amended by the Panama Canal Act, in connection with the ownership of the San Francisco and Portland Steamship Company, said opinion being reported in 34 I. C. C. 165.

III.

The Court erred in overruling defendant's objection to Finding of Fact No. I and in not sustaining said objection for the reasons therein stated. [142]

IV.

The Court erred in overruling defendant's objection to Finding of Fact No. II and in not sustaining same, and erred in holding that this defendant in the operation of its vessels between the ports of Portland, Oregon, and San Francisco, California, was and is subject to the Act to Regulate Commerce or made subject thereto by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," commonly known as "The Panama Canal Act."

V.

The Court erred in overruling defendant's objection to Finding of Fact No. III and in not sustaining same, said objection being that the excess charges collected by defendant from plaintiff's assignors between the 17th day of February, 1916, and the 28th day of December, 1917, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland, in the sum of two thousand six hundred and forty-eight and 64/100 dollars ($2,648.64) was barred by the statute of limitations since the cause of action of plaintiff did not accrue within two years immediately prior to the filing of the compiaint, and further objects that collections for freight charges made during the period from October 15, 1917, to the 29th day of December, 1917, were made by defendant in its capacity as agent and operator of the vessels for the United States Shipping Board.

VI.

The Court erred in overruling defendant's objection to Finding of Fact No. VI, which said objection was that the contracts of carriage of said freight of which Plaintiff's [143] Exhibit Nos. 5 and 6 were typical, were, in effect, made as agent for the United States Shipping Board and not on behalf of the defendant as principal and that the United States Shipping Board was the principal in said transactions, all of which plaintiff well knew.

VII.

The Court erred in overruling and not sustaining defendant's objection and exception to conclusion

of Law No. I, and in failing to conclude that defendant collected only the legal, proper, and valid tariff rates, and furthermore that the cause of action of plaintiff, if any he has, in respect to the charges collected on shipments from the 17th day of February, 1916, to the 28th day of February, 1917, did not accrue within the two years immediately prior to the commencement of the action and is therefore barred by law.

VIII.

The Court erred in overruling defendant's objection to Conclusion of Law No. II, in which the Court held defendant liable to shippers on bills of lading and contracts of carriage and collection of charges notwithstanding that the United States Shipping Board had requisitioned the vessels of defendant.

IX.

The Court erred in overruling defendant's objection to Conclusion of Law No. III, wherein the Court held defendant liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved. [144]

X.

The Court erred in overruling and not sustaining defendant's objection to Conclusion of Law No. IV, and entering judgment wherein not a judgment is held proper against defendant, for the sum of eleven thousand three hundred and eighty and 69/100 dollars ($11,380.69), on which said sum two thousand

six hundred and forty-eight and 64/100 dollars ($2,648.64) was the amount collected prior to the 29th day of December, 1917, and the further sum of two thousand six hundred and eighty 7/100 dollars ($2,680.07), with interest from the 25th day of August, 1920, and the further sum of six thousand and fifty-one 98/100 dollars ($6,051.98), with interest from March 1, 1921, in each case at six per cent (6%) per annum, and the further sum of two thousand dollars ($2.000.00) as attorney's fees.

XI.

The Court erred in overruling defendant's objection generally to a judgment in favor of plaintiff for any sum of money and in not entering judgment as requested in its favor for the reason that the testimony properly supports such judgment.

XII.

The Court erred in failing to enter a judgment for defendant as requested and in not giving judgment in favor of defendant for the dismissal of plaintiff's complaint.

XIII.

The Court erred in holding and finding that Portland was a point intermediate to North Portland upon the route between San Francisco, California, and North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad and Navigation Company at the time of the movement of the respective shipments, and in failing to conclude North Portland to be a point nearer to San Francisco than Portland. [145]

XIV.

The Court erred in entering judgment in favor of the plaintiff and against defendant as indicated in the findings of fact and conclusions of law which the court filed as its decision in this case.

XV.

WHEREFORE, the said defendant and plaintiff in error prays that said judgment of the District Court be reversed with directions to the District Court to enter a judgment in favor of the defendant.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, this 27th day of September, A. D. 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [146]

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AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [147]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein and include in said transcript the following proceedings, papers, records, and files, to wit:

1. The plaintiff's complaint with amendments and supplemental demands.
2. Defendant's demurrer.
3. Answer.
4. Reply. ....
5. Bill of exceptions and certificate omitting exhibits attached thereto.
6. Judgment.
7. Petition for writ of error.
8. Assignments of error.
9. Order allowing writ of error and fixing bond.
10. Supersedeas bond and bond for costs.

11. Writ of error.
12. Citation on writ of error. [148]
13. Stipulations as to printing record.
14. This praecipe and any and all records, entries, orders, papers, proceedings, and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [149]

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AND AFTERWARDS, to wit, on Wednesday, the 28th day of September, 1921, the same being the 75th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [150]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Minutes of Court—September 28, 1921—Order Allowing Writ of Error.**

This 28th day of September, 1921, came the defendant above named, The San Francisco and Portland Steamship Company, a corporation, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorneys and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this court, made and entered on the 5th day of August, 1921, in favor of the plaintiff abovenamed and against said defendant and the findings of fact and conclusions of law made or refused on the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be

sent to the said Circuit Court of Appeals for the Ninth Circuit and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration thereof, this Court does allow said writ of error upon said defendant filing with [151] the clerk of this court a good and sufficient bond in the sum of $15,000.00, to the effect that if said defendant, The San Francisco and Portland Steamship Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 28th day of September, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [152]

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AND AFTERWARDS, to wit, on the 28th day of September, 1921, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [153]

In the District Court of the United States for the District of Oregon.

L.–8748.

A. J. PARRINGTON,
Plaintiff,

vs.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that the San Francisco and Portland Steamship Company, a corporation, principal, and National Surety Company of New York, a corporation, surety, are hereby and firmly bound unto A. J. Parrington, the above named plaintiff in the sum of $15,000.00, to be paid to the said A. J. Parrington, to which payment well

and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated the 27th day of September, 1921.

WHEREAS, the above-named San Francisco and Portland Steamship Company is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 5th day of August, 1921:

Now, the condition of this obligation is such that if the above-named The San Francisco and Portland Steamship Company, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good this plea, then this obligation to be void; otherwise to be and remain in full force and effect.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
By C. E. COCHRAN,
One of Its Attorneys.

THE NATIONAL SURETY COMPANY, OF NEW YORK.
By E. P. WELCH,
Resident Vice-President. [153½]

[Seal] Attest: D. E. GORTON,
Resident Assistant Secretary.

Countersigned at Portland, Oregon, this 27th day of September, 1921.

E. P. WELCH,
Resident Agent.

Examined and approved this 28th day of September, 1921.

R. S. BEAN,
District Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921, G. H. Marsh, Clerk. [154]

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AND AFTERWARDS, to wit, on the 3d day of October, 1921, there was duly filed in said court a stipulation as to transcript of record, in words and figures as follows, to wit: [155]

In the District Court of the United States for the District of Oregon.

L.—8748.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Stipulation as to Transcript of Record.**

It is stipulated and agreed by and between counsel for the respective parties that in preparing a certified copy of the record, the clerk of this court may omit the preparation of copies of the original exhibits

physically attached to the bill of exceptions and except such exhibits from the effect of his certificate.

Dated at Portland, Oregon, this 27th day of September, 1921.

C. E. COCHRAN,
Attorney for Plaintiff in Error.
WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Filed October 3, 1921. G. H. Marsh, Clerk. [156]

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AND AFTERWARDS, to wit, on the 28th day of October, 1921, there was duly filed in said court a stipulation relative to exhibits in words and figures as follows, to wit: [157]

In the District Court of the United States for the District of Oregon.

L.—8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Stipulation Re Original Exhibits.**

WHEREAS, Defendant's Exhibits "C" and "D" in the above-entitled action consists of a Requisition Charter respectively of the steamers "Beaver" and "Rose City" owned by the San Francisco & Portland

Steamship Company, but the subject of charter to the United States Shipping Board; and

WHEREAS, said exhibits are in words and figures the same except Exhibit "C" is for the steamer "Beaver" and Exhibit "D" is for the steamer "Rose City"; and

WHEREAS, the above-entitled action was consolidated for trial with the action of A. J. Parrington vs. James C. Davis, Agent, United States Railroad Administration, which case is also being taken to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, it is stipulated and agreed by and between the counsel for the respective parties that Defendant's Exhibit "D" may be attached to and made a part of the bill of exceptions and that same may also serve as Defendant's Exhibit "C" as well, so that Exhibit "C" may be attached to the bill of exceptions in the case of A. J. Parrington vs. James C. Davis, Agent, United States Railroad Administration.

Dated at Portland, Oregon, this 26th day of October, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.
C. E. COCHRAN,
Attorney for Defendant.

Filed October 28, 1921. G. H. Marsh, Clerk.

[157½]

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 157, inclusive, constitute the transcript of record upon writ of error in the cause in said court in which A. J. Parrington is plaintiff and defendant in error and San Francisco & Portland Steamship Company, a corporation, is defendant and plaintiff in error; that said transcript has been prepared by me in accordance with the praecipe filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record annexed thereto the original writ of error and the original citation filed in said cause.

I further certify that the cost of the foregoing transcript of record is $54.15 and that the same has been paid by the said plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 7th day of October, 1921.

[Seal] G. H. MARSH,
Clerk. [158]

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[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed November 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

L.—8748.

October 25, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

**Order Extending Time to and Including November 15, 1921, to File Record and Docket Cause.**

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to November 15, 1921.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Nov. 15, 1921, to File Record and Docket Cause. Filed Oct. 28, 1921. F. D. Monckton, Clerk. Refiled Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Stipulation Re Omission of Exhibits Attached to Complaint.**

It is stipulated and agreed by and between counsel for the respective parties that in printing the record in the above-entitled action, the clerk of the Circuit Court of Appeals may omit the printing of the following documents constituting exhibits attached to the complaint:

"A" on page 17 of the transcript.
"B" on page 18 of the transcript.
"C"on page 19 of the transcript.
"D" on pages 20, 21, 22 of the transcript.
"E" on page 23 of the transcript.
"F" on page 24 of the transcript.
"G" on page 25 of the transcript.
"H" on page 26 of the transcript.
"I" on page 27 of the transcript.
"J" on page 28 of the transcript.
"K" on page 29 of the transcript.
"L" on page 30 of the transcript.

"M" on page 31 of the transcript.
"N" on page 32 of the transcript.
"O" on page 33 of the transcript.
"P" and "Q" on page 34 of the transcript.
"R" and "S" on page 35 of the transcript.
"T" on page 36 of the transcript.
"U" on page 37 of the transcript.
"V" on pages 38 and 39 of the transcript.

and also the following supplementary exhibits:

Supplementary Exhibit "C" on page 56 of the transcript.

Supplementary Exhibit "F" on page 57 of the transcript.

Supplementary Exhibit "I" on page 58 of the transcript.

Supplementary Exhibit "U," paragraph 12 of complaint.

Supplementary Exhibit "L" on page 59 of the transcript.

Supplementary Exhibit, "Allen & Lewis," on page 60.

Supplementary Exhibit "V" on page 61 of the transcript.

Supplementary Exhibit "C" on page 62 of the transcript.

and in lieu thereof print this stipulation instead:

Said exhibits present among other things the following typical claims:

(A) Freight Bill No. 246; Way Bill Date 5–19–16; No. 320; Consignor C. & H. Sugar Refining

Co.; Ship Rose City, Voyage 192; Weight 35,287 lbs.; Rate 15¢ freight, including war tax, $52.93; Date paid 5–25–1916; Overcharge claimed $8.32.

The aforesaid claim is typical of all shipments contained in said exhibits originating prior to January 1, 1918.

(B) Freight Bill No. 205; Way Bill Date 8–30–1920; No. 419; Consignor Western Sugar Refinery; Ship Rose City, Voyage 313; Weight 48,001 lbs; Rate 24¢ freight, including war tax, $118.65; Date paid 9–10–20; Overcharge claimed $22.25.

The above claim is typical of all claims contained in said exhibits referring to shipments subsequent to March 1, 1920.

The amount of the claims of which (A) is typical is $2,648.64.

The amount of the claims of which (B) is typical is $8,732.05.

There are a number of claims of which (A) above is typical in respect to shipments between the dates of October 15, 1917, and December 31, 1917, both dates inclusive, the amount of which can be determined by simple computation from the exhibits.

Dated at Portland, Oregon, this 9th day of November, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Ore., 1921.

_____,

Attorney for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Stipulation. Filed November, 1921. ————, Clerk.

No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed December 13, 1921. F. D. Monckton, Clerk.

No. 3800

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

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THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

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**Upon Writ of Error to the United States District Court of the District of Oregon.**

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**PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. L–8723.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

**Stipulation for Consolidation of Causes for Trial.**

IT IS STIPULATED AND AGREED between counsel for the respective parties to the above causes

of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First: That the above-entitled three causes of action may be consolidated for trial in the above-entitled court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second: That the transcript of record in the case of James C. Davis, Director General, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, docketed and filed in this court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L–8723, James C. Davis, Agent, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, and the decision of said case shall not follow the order in the other two cases above mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L–8723.

Dated at Portland, Oregon, this 9th day of January, 1922.

C. E. COCHRAN,
Of Counsel for Plaintiffs in Error.
JAMES G. WILSON,
Counsel for Defendant in Error.

Dated: San Francisco, California, January 11, 1922.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Stipulation for Consolidation of Causes for Trial. Filed Jan. 11, 1922. F. D. Monckton, Clerk.

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At a stated term to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable ERSKINE M. ROSS, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error.

vs.

PORTLAND SEED COMPANY, a Corporation,
Defendant in Error.

**Order of Submission.**

ORDERED leave granted Mr. Ben C. Dey, to appear as *amicus curiae;*

FURTHER ORDERED above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as *amicus curiae,* and by Mr. James G. Wilson, counsel for the defendant in error in each of the above-entitled causes, and submitted to the Court for consideration and decision, with leave to Mr. Dey to file a brief as *amicus curiae* within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

At a stated term to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis, etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY,
Defendant in Error.

**Opinion U. S. Circuit Court of Appeals.**

Upon Writs of Error to the District Court of the United States for the District of Oregon.

Before ROSS, MORROW and HUNT, Circuit Judges.

On writs of error to review judgments in favor

of shippers for recovery of excess charges by carriers.

PARRINGTON'S CASES.

HUNT, Circuit Judge:

These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916, the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a minimum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods mentioned the rate as per Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June

25, 1918 was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

## THE SEED COMPANY CASE.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Huntington, Oregon, thence by Oregon-Washington Railroad and Navigation lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland

Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant than Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the joint rate via the rail and water line. The accuracy of this reasoning depends upon whether the case is to be considered

in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the Court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to

charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.' " (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn. R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however, point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co. vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it was unnecessary to apply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly

not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and that neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words "or route," it called for a new, and we believe, a broader interpretation by which the word "route"

is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R., —— U. S. ——, Feb. 27, 1922.) We have here too the circumstance that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as *amicus curiae* it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the contrary intent is to be gathered from the provision of section 206 (a) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose." There is also a further provision that such

action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted carriers to violate the long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as *amicus curiae* has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robinson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of a decision of the Interstate Commerce Commission which was not mentioned in the

pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increases in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other than at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years after the cause of action has accrued and not after. Prior

to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Western R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the

statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respects the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that

court as attorneys' fees, fees for conducting the cases in this court are also allowed (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862. A reasonable fee in case #3799 in this court is $600; in case #3800, $1000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[Endorsed]: Opinion. Filed Jun. 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Judgment U. S. Circuit Court of Appeals.**

In error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorneys' fee in the sum of $1000 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered June 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error,

**Order Staying Issuance of Mandate, etc.**

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED mandate of this court in the above-entitled cause stayed to and including

August 31, 1922, for the purpose of enabling said counsel to perfect a writ of error from the Supreme Court of the United States to the above-entitled court.

Dated: San Francisco, California, June 17, 1922.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed June 17, 1922. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

**Petition for Writ of Error.**

Your petitioner, The San Francisco and Portland Steamship Company, plaintiff in error in the above-entitled cause, respectfully shows:

That said cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that judgment has been therein rendered on the 5th day of June, 1922, affirming the judgment of the District Court of the United States, for the District of Oregon.

The matter in said action exceeds One Thousand Dollars, besides costs, and the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the action or controversy, being aliens or citizens of the United States, or citizens of the different states; this action does not arise under the patent laws nor the revenue laws, nor the criminal laws, nor is it an admiralty cause, but is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

This petitioner therefore respectfully prays that a writ of error be allowed it in the above-entitled action, directing the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, to send the record and proceedings in said action, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
By ARTHUR C. SPENCER,
C. E. COCHRAN,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for, upon the plaintiff in

error giving bond according to law, in the sum of Fifteen Thousand ($15,000.00) Dollars.

W. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, July 31st, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

[Endorsed]: Petition for Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Assignment of Errors.**

Now comes the plaintiff in error by Arthur C. Spencer and Charles E. Cochran, its attorneys, and says:

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause and

in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Eleven Thousand Three Hundred Eighty and Sixty-nine One-hundredths ($11,380.69) Dollars, with interest as in said judgment stated, and the further sum of Two Thousand ($2000.00) Dollars as attorney's fees in the District Court, and the further sum of One Thousand ($1000.00) Dollars attorney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the 5th day of June, 1922, in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint.

(b) Assignment of Error Number Seven charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates.

(c) Assignment of Error Number Eight wherein error is charged in overruling the objection to conclusion of law Number Two, in which the plaintiff in error, as defendant in the court below, was held liable to shippers on bills of lading and contracts of carriage and collection of charges during the time the vessels were requisitioned by and under Charter Two of the United States Shipping Board and all operations of said vessels were for account of said Shipping Board, between Oct. 20th and Dec. 28, 1917.

(d) Assignment of Error Number Nine, wherein error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect

between San Francisco and North Portland at the time said respective shipments moved.

(e) Assignment of Error Number Thirteen, wherein error was charged in holding and finding that Portland was a point intermediate to North Portland upon the line or route between San Francisco, California and North Portland, Oregon, over the line of The San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of the respective shipments.

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206c of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below, because

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against plaintiff in error.

WHEREFORE, the said The San Francisco and Portland Steamship Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States District Court, for the District of Oregon, as affirmed by the judgment of the United States Circuit Court of Appeals be reversed, annulled and esteemed for naught, and that said cause be remanded to the United States District Court for the District of Oregon with instructions to grant a new trial in said cause, and upon such trial to dismiss the complaint, and for such further proceedings in said cause as may be determined upon by our Supreme Court to the end that justice may be done in the premises.

A. C. SPENCER,
C. E. COCHRAN,
Attorneys for Plaintiff in Error.

[Endorsed]: Assignment of Errors on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Service by copy admitted Portland, Oregon, July 31st, 1922.

WILSON & GUTHRIE,
Attorneys for Deft. in Error.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroads Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

**Order Allowing Writ of Error and Fixing Amount of Bond.**

Based upon the petition of the plaintiff in error, together with certain assignments of error intended to be urged by him within due time,—

IT IS ORDERED that a writ of error issue upon said plaintiff in error filing a bond with the Clerk of this Court in the sum of Ten Thousand ($10,000.00) Dollars, said bond to operate as a supersedeas.

IT IS FURTHER ORDERED that the bond presented by the said petitioner be, and the same is hereby approved.

WM. H. HUNT,
U. S. Circuit Judge.

Dated, San Francisco, Cal., August 2, 1922.
Form O. K. G. B. G.

[Endorsed]: Order Allowing Writ of Error Returnable in Supreme Court U. S. and Fixing Amount of Bond. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, The San Francisco and Portland Steamship Company, as principal, and National Surety Company, as surety, are held and firmly bound unto A. J. Parrington, in the full and just sum of Fifteen Thousand ($15,000.00) Dollars to be paid to the

said A. J. Parrington, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 20th day of July, 1922.

WHEREAS, lately at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, in an action depending in said court, between The San Francisco and Portland Steamship Company, plaintiff in error, and A. J. Parrington, defendant in error, judgment was rendered against the said The San Francisco and Portland Steamship Company, and the said The San Francisco and Portland Steamship Company having obtained a writ of error and filed a copy thereof in the clerk's office of said United States Circuit Court of Appeals, to reverse the judgment in the aforesaid action, and a citation directed to the said A. J. Parrington citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the second day of October, 1922.

Now, the condition of the above obligation is such, that if the said The San Francisco and Portland Steamship Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above

obligation to be void; otherwise to remain in full force and virtue.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY.

By C. E. COCHRAN,
One of Its Attorneys.

[Seal] NATIONAL SURETY COMPANY OF NEW YORK.

By H. C. LEIGH,
Attorney in Fact.

Countersigned at Portland, Oregon, this 20th day of July, 1922.

D. E. GORTON,
Resident Agent.

Examined and approved this 2d day of August, 1922.

WM. H. HUNT,
Circuit Judge.

Service by copy admitted at Portland, Oregon, this 31st day of July, 1922.

WILSON & GUTHRIE,
Attorney for Defendant in Error.

Form and amount approved.

WILSON & GUTHRIE.

[Endorsed]: Bond on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seventy-two (172) pages, numbered from and including 1 to and including 172, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on writ of error from the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the plaintiff in error, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon writ of error from

the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 29th day of August, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

**Writ of Error.**

The United States of America,—ss.

The President of the United States to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals befor you, or some of you, between The San Francisco and Portland Steamship Company, a corporation, plaintiff in error, and A. J. Parrington, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington,

D. C., within sixty days from the date hereof; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, 1922.

[Seal] F. D. MONCKTON,
Clerk of the Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Allowed by:

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

**Return to Writ of Error.**

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 29th day of August, A. D. 1922.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Seal] By F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3800. United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco & Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed Aug. 18, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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In the Supreme Court of the United States.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States to A. J. Parrington, Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the Supreme Court of the United

States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The San Francisco and Portland Steamship Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the Circuit Court of Appeals for the Ninth Circuit, this 18th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

WM. H. HUNT,
Judge, United States Circuit Court of Appeals for the Ninth Circuit.

Copy of writ served on us this 21st day of August, 1922.

JAMES G. WILSON,
Attorneys for Defendant in Error.

Service by copy admitted at Portland Oregon, August 21st, 1922.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 3800. In the Supreme Court of the United States. The San Francisco & Portland Steamship Company, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. Filed Aug. 23, 1922. F. D Monckton, Clerk. By Paul P. O'Brien, Deputy.

FEB 16 1924

# In the Supreme Court of the United States

OCTOBER TERM, 1923

No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

## REPLY BRIEF FOR PLAINTIFF IN ERROR

ARTHUR C. SPENCER,
Pittock Block, Portland, Oregon,
Attorney for Plaintiff in Error.

JAMES G. WILSON,
Platt Building, Portland, Oregon,
Attorney for Defendant in Error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1923

No. 122

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

## REPLY BRIEF FOR PLAINTIFF IN ERROR

In view of the filing by the Director General of Supplemental rather than Reply Briefs in Dockets 114 and 123, and because of the different construction placed upon the Fourth Section of the Act to Regulate Commerce by the learned counsel for the Director General than that entertained by the Plaintiff in Error herein, we would reply to the brief of Defendant in Error (hereinafter referred to as "plaintiff") in this cause.

THE DISTRICT COURT WAS WITHOUT JURISDICTION

The District Court's jurisdiction is asserted by the plaintiff upon the theory that no "administrative question depending upon facts to be ascertained from investigation" is presented.

Assuming, but not conceding that the rate to Portland was unlawful; it became necessary to establish one that was lawful. The rate to the more distant point might well be in a given case far in excess of or below a reasonable and lawful rate.

It so happens in this case that by reason of competition of lumber schooners returning northbound the rates were unduly low (Transcript 79 and 80). The establishment of a lawful rate to Portland might well necessitate "reconstituting the whole rate structure for many articles moving in an important section of the country."

> Keogh vs. Chicago & N. W. Ry. Co., 43 Sup. Ct. Rep. 47-50.

As before pointed out (page 32, opening brief), application to the shorter haul of the rate to the more distant point is not established as lawful by Section 4. Again, as is not improbable in this case, the rate to the more distant point might well be so far short of the line of reasonableness as to return substantially less than cost, casting a burden upon other traffic and constituting an unlawful preference to those using it.

Admission to the Court is not authorized by a determination by statute or by finding of the Commission of discrimination; same must be supplemented and attended by a lawful measure of compensation for the transportation service involved. The ascertainment of this measure, viz.: the reasonable, non-discriminatory rate, involves the exercise of administrative functions with which the Commission alone is clothed.

When thus ascertained the aggrieved party may recover, if the case warrants such action, *damages,* if any, caused by the alleged unlawful discrimination.

Penn. R. R. Co. vs. Int. Coal Co., 230 U. S. 184-202.

PLAINTIFF'S ASSIGNORS SUSTAINED NO INJURY BY THE PUBLICATION OF THE RATES TO NORTH PORTLAND AND HAVE PROVEN NO DAMAGE.

The complaint in this case sets forth the claims involved as *"overcharge"* claims. As was the case in International Coal Co., page 198, *supra,* no claim of damage is made, and there is neither allegation nor proof that injury was suffered. Nothwithstanding the distinction between overcharge and damage claims made in the Act and recognized by this Court, and in the face of the construction established, we think, by this Court in the International Coal Company case, that civil action on sections 2, 3 and 4 of the Act must be for damages resulting from injury sustained by reason

of prohibited discrimination practiced, no attempt has been made to comply with section 8 of the Act by proving these indispensable elements of injury and damage.

It will be asserted that the law will presume the rate to the more distant point, as applied to the intermediate point, to be reasonable and non-discriminatory.

On the contrary, Section 4 declares in substance that such presumption shall not be indulged. Furthermore, the history of the legislation and the operations of the carriers with respect to this section of the Act, demonstrate that rates to the more distant points were expected to be and have been below the level of reasonable rates and uniformly discriminatory.

The tendency of the carriers to make unduly low rates under this section to the more distant points to effectively compete with water carriers for tonnage destined to such points, thereby imposing, according to claims asserted, an undue burden upon other traffic, led to an amendment in 1910 that rates reduced to meet water competition should not be increased unless the Commission found that such proposed increase rested upon changed conditions other than the elimination of water competition, and to the 1920 amendment prohibiting rates to or from the more distant point *"not reasonably compensatory for the service performed."*

While Sections 2, 3 and 4 of the Act have for their purpose the prevention of unlawful discriminations and were considered as inter-related upon the enactment of the law as originally passed and in the administration of it since, yet Section 4 could not have been conceived as necessary for the protection of an individual shipper or group of shippers.

Ample protection for them was and is afforded by the *"all embracing"* provisions of the second and third sections of the Act (Intermountain Rate Cases, 234 U. S. 476-482).

The "generic provisions" of Sections 2 and 3 of the Act deal with voluntary acts of the carrier, while Section 4 recognizes conditions over which the carrier has no control, necessitating a rate for a longer haul less than the reasonable rate obtaining to a shorter distance point on the same line and route if the carrier is to participate in the business.

The matter as it obtained from the first was one of "public concern broader than the mere question of the duty of the carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate."

Intermountain Rate Cases, *supra*, 484.

While prior to the 1910 amendment the power to determine the lesser rate to the more distant point was lodged with the carrier, such determination was subject

"to the supervision and control of the Interstate Commerce Commission" and ultimately to judicial review. The amendment referred to "takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function."

The general public interest involved in the administration of Section 4 is reflected very clearly in the opinion of this Court in the Intermountain Cases *supra.* That it was not and is not the intent of the law to recognize as lawful, rates to the more distant point subversive of this public interest is made clear in East Tenn. etc., Ry. vs. Interstate Commerce Commission, 181 U. S. 1-20, wherein the Court suggests as *obviously* unlawful a rate which fails to yield the cost of the transportation.

That Congress did not intend Section 4 to be available to shippers as a basis upon which to prosecute "overcharge" claims is demonstrated by the following:

In its 33d Annual Report to Congress made December 1, 1919, the Interstate Commerce Commission at page 27 said:

> "An important question frequently arising is as to the right of complainants to reparation when higher rates are charged for shorter than for longer distances over the same line or route where the shorter is included within the longer distance, in violation of the fourth section.

"This question is considered in our reports in Iten Biscuit Co. v. Chicago, Burlington & Quincy Railroad Company. In our original report in that case, 50 I. C. C., 724, the rates charged were found to have been in violation of the long-and-short haul rule, but in the absence of proof of unreasonableness and damage, reparation was denied and the complaint dismissed.

"Upon complainant's petition the case was reopened for further consideration. In our report, 53 I. C. C. 729, the original findings were affirmed. We stated, following the decision of the United States Supreme Court in Pennsylvania Railroad Co. vs. International Coal Co., 230 U. S. 184:

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable per se and the lower rate too low. In such a case

the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and consequent damage. In this instance, as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pacific Co. v. Darnell-Taenzer Co., *supra,* may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the court was 'whether the fact that the plaintiffs were able to pass on the damage sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under Sections 2 and 3 there must be proof of damage and under Section 4 the departure therefrom is of itself proof of damage."

After its attention had been thus called to the construction the Commission was placing upon Section 4, and with full knowledge of the manner in which the same was being applied and administered, Congress by Act approved February 28, 1920, in amending Section 4 made no change with respect to the provision here involved.

41 U. S. Statutes at Large, page 480.

It appearing from the testimony of the plaintiff himself (page 73, Transcript) that the packing house at North Portland did not buy sugar to sell it to the trade, and that no business was conducted there in competition with his assignor merchants, damages resulting from the operations of the packing house people (Swift & Company) would be improbable and certainly should not be assumed irrespective of whether the sugar consumed by them was delivered by boat at their wharf at North Portland or purchased by them at Portland or elsewhere.

THE PORT-TO-PORT OPERATIONS OF THE STEAMSHIP COMPANY WERE NOT SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE, AND THE GOVERNMENT WAS NOT RESTRAINED BY THE PROVISIONS OF THE CANAL ACT OR THE COMMERCE ACT IN THE OPERATION OF THE SHIPS OF THE STEAMSHIP COMPANY WHICH WERE REQUISITIONED BY THE UNITED STATES SHIPPING BOARD, EFFECTIVE OCTOBER 15, 1917.

In our opening brief, at page 18 et seq., we have discussed the Panama Canal Act in its relation to the operations of the Steamship Company, in view of the

mandate contained in Section 15 of the Commerce Act, wherein jurisdiction is denied the Commission with respect to transportation conducted wholly by water, and notwithstanding the fact that the Oregon-Washington Railroad & Navigation Company (the parent company of the plaintiff in error) owns or operates no line of railroad south from Portland, we deem it unnecessary to discuss the question as to whether or not the consent of the Commission was an essential prerequisite to the continued operation of the steamship line from and subsequent to July 1, 1914.

We do submit, however, that when under the Emergency Shipping Fund provision of the Urgent Deficiency Appropriation Act of June 15, 1917, the President requisitioned the ships of this steamship company, the act was a soverign one, and the possession and control taken and assumed was attended with all of the attributes of sovereignty.

From the effective date of the Government's requisition, the corporate possession and control of the steamship company ceased and became an agency control and possession for the Government. From that moment the Government could operate the ships through its Canal or upon the route of the steamship company, or elsewhere as the emergencies of the changing situation required.

Enveloped in a condition requiring such summary action by the Government, it is inconceivable that the

operations of the ships were subject to the restraining provisions of Section 4 of the Commerce Act, or to any regulation or order of the Commission whatsoever. Shipping contracts made on and after October 15, 1917, and until May 29, 1918, in the name of the steamship company were and are contracts of the Shipping Board for account of the Government, and the incident of billing was and is immaterial.

Director General vs. Zirkle, 138 N. E. (Ind.) 266.

Louisiana v. Tex. & Pac. Ry., 229 U. S. 336-341.

Missouri Pac. R. R. Co. v. Ault, 256 U. S. 554.

It cannot be that the steamship company is exposed to actions of this kind by shippers or their assignees on agency transactions conducted for the Government and closed years since.

We note on page 29 of the brief of defendant in error reference to "*certain of the boats* on which part of the sugar was handled were under requisition," etc. It is difficult to understand why this expression. The steamers "Rose City" and "Beaver" were the only ships owned or operated during the period in question and until the charter by the Director General of the steamship "Blandon," pursuant to authority of Mr. C. R. Gray, Director of the Division of Operation, United States Railroad Administration. (Page 96, Transcript.)

We think the statement of this fact is amply confirmed by the record, and in this connection quote from page 99 of the Transcript:

"Mr. Wilson: The 'Rose City' and 'Beaver' continued to operate between San Francisco and Portland during this entire period?

"Mr. Cochran: Yes; there was no cessation of the movement of the boats.

"Mr. Wilson: And they continued to handle shipments tendered to the agent at San Francisco, the same as before that time?

"Mr. Cochran: Yes, they did just as the telegram, this Exhibit 'B' said to do, namely, to operate their regular trades—operate in their regular trades, *and the company did continue the operation of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.*"

THE WORD "CHARGE," AS USED IN SUBDIVISION 1 OF SECTION 4 OF THE COMMERCE ACT CONVEYS THE IDEA OF OBLIGATION, AND THE ACT DOES NOT CONTEMPLATE THAT ANY OBLIGATION CAN BE IMPOSED UPON THE SHIPPER OR CONSIGNEE, OR ASSERTED BY THE CARRIER UNTIL A TRANSPORTATION SERVICE IS PERFORMED.

In view of what has been said on this question (page 59 et seq.) in our opening brief and the exhaustive discussion of the counsel for the Director General in his supplemental brief in Cases 114 and 123, we will not

attempt to pursue the subject further than to say that if an indictment were presented against a carrier for concurring in a joint tariff prepared and filed by another and connecting carrier publishing a paper rate over a joint route, the originating carrier having published and used a higher rate for transportation of the same commodity to an intermediate point on its own line, it is inconceivable that conviction would be permitted or sustained upon a record showing no transportation performed upon the joint route, no shipments offered to the destination upon the connecting carrier, and no obligation claimed or asserted.

OPINION IN UNITED STATES VS. LOUISVILLE & NASHVILLE CO., 235 U. S. 314, DID NOT INTEND TO MODIFY OR MAKE OR RECOGNIZE ANY EXCEPTIONS TO THE MANDATORY PROVISIONS OF SECTION 6 OF THE ACT REQUIRING THE CARRIER TO CHARGE AND COLLECT ITS PUBLISHED RATES.

This Louisville & Nashville case has been cited repeatedly by counsel for defendant in error to sustain his contention that the Steamship Company having failed to obtain authority from the Commission for the higher local rate to Portland than the lower joint rate to North Portland, the local rate ceased to exist or did not exist at all because of the 1910 amendment to Section 4 of the Act, taking from the carrier "the right in the first instance to decide the relativity of such rates."

Commercial houses at Atlanta and other Georgia cities, complained of undue preference and advantage

accorded by the carriers to Nashville, Tenn., in that rebilling or reshipping privileges were granted to Nashville dealers. Grain, grain products and hay from Ohio and Mississippi River crossings were shipped into Nashville and there unloaded and when later shipped to the southeast, settlements were made on basis of through rate from originating point through Nashville to point of destination, the adjustment being accomplished in the claim department of the Railroad Company where the shipper was paid an amount equal to the difference between the through rate and the sum of the locals. This practice was condemned by the Commission as a violation of Section 3 of the Act (16 I. C. C. 590; 21 I. C. C. 186), and it is difficult, without having access to the record before the Commission, to find wherein a violation of Section 4 of the Act could have been involved. But assuming, as we consider that we are bound to do, that Section 4 was involved, it is in our opinion immaterial upon the question we are discussing.

The parties interested by proceeding in the Commerce Court, enjoined the order of the Interstate Commerce Commission and this court in reviewing the action of the Commerce Court had for its determination the one question "as to the legality of the reshipping privilege permitted at Nashville by the carriers." This court found that the Commerce Court exceeded its jurisdiction, and that, notwithstanding its recital that the evidence was undisputed, "the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most

fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." The Chief Justice then reasons to the conclusion that if the rebilling privilege was, when originally established, an exertion of the authority conferred or recognized by Section 4 of the Act "it followed that its continued operation was manifestly *unlawful* and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below." The court then determines that the rebilling privilege in question was "controlled by Section 4 of the Act." So, it appears that this court sustained the Interstate Commerce Commission in condemning the rebilling privilege and finds that the rates resulting from the practice were unlawful and in violation of Section 4 of the Act.

It is true that preliminary to the ultimate decision of the case the Chief Justice makes the statement so zealously clung to by counsel for the plaintiff that *"it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted."* But the quoted statement is merely inducement to and merged in the ultimate finding of the unlawful character of the practice condemned. It is unreasonable to attribute to it more force than that attributable to the final conclusion.

That a rate complained of might have been unlawful at and from the time it was published may be con-

ceded, and yet the carrier required and compelled to collect it as the only legal rate, is established by such an unbroken line of authority that it seems to us unreasonable to attach the importance claimed by counsel for plaintiff to the expression of the Chief Justice in the Louisville & Nashville case quoted by him.

It is but fair to consider in reading the opinion and considering the quoted expression to follow the pronouncement of this court in East Tennessee, etc., Railway Co. vs. I. C. C., *supra,* page 17:

> "The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided."

THE TWO-YEAR LIMITATION PERIOD.

In his earnest argument to be relieved from the consequences that must follow from the decisions of this Court in Phillips vs. Grand Trunk Western Railway, 236 U. S. 662, and Kansas City Southern vs. Wolff, et al, 43 S. C. R. 259, counsel discusses the two-year period prescribed by the Commerce Act as the time within which complaints for the recovery of damages must be filed as directed against the remedy. In this we think he errs.

The claims involved in this case certainly could not be successfully asserted at common law if the rates actually paid were in and of themselves reasonable.

Cowden vs. Pacific Coast SS. Co., 94 Calif. 470.

Plaintiff has therefore of necessity predicated his case upon the Interstate Commerce Act, and such rights as he may have are extended and circumscribed by that Act.

In Eberhart vs. U. S., 204 Fed. 884, at page 890, Judge Sanborn, in his concurring opinion, says:

> "An Act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limitations thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates (The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; Pollard v. Bailey, 20 Wall. 520, 526, 527, 22 L. Ed. 376; Bank v. Francklyn, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825; Boyd v. Clark (C. C.) 8 Fed. 849; Brunswick Terminal Co. v. National Bank of Baltimore, 99 Fed. 635, 638, 639, 40 C. C. A. 22, 25, 26), because such limitations are conditions of the liability itself and not limitations of the remedy only. They are excepted from the rule announced in Campbell v. Holt, 115 U. S. 620, 628, 6 Sup. Ct. 209, 29 L. Ed. 483, to the effect that the right to defeat a just personal debt for a common-law liability, in that case for a conversion of the plaintiff's money, is not a vested right, which the Legislature may not overthrow at pleasure by extending the time for collecting it."

When Congress enacted the provisions against discrimination involved in this act, and further provided in the same act that a party aggrieved by reason of the violation of said provisions prohibiting discrimination could recover damages upon condition that he file his complaint within two years from the time the cause of action accrued *and not after,* a compliance with the condition imposed by the enactment became indispensable to recovery. In other words, it is not a limitation statute at all in the sense in which that expression is ordinarily used. This limitation relates not merely to the remedy but to the right of action.

Seaboard Air Line v. Renn, 241 U. S. 290.

Atlantic Coast Line v. Burnette, 239 U. S. 199.

In other words, there has been a jurisdictional failure on the part of the plaintiff, and no plea upon the part of the defendant was or is necessary to avail itself of plaintiff's omission.

It may be urged that the claims involved are restored and reinstated by virtue of Section 206, subparagraph (f) of the Transportation Act (41 Statutes at Large, 461-462), reading as follows:

> "(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control."

We respectfully submit that this provision cannot so operate. Claims of the plaintiff expired with the two-year period. After that date the moneys collected by the steamship company became its absolute property, and to refund it or any part of it would amount to a rebate. The ownership of this personal property by the steamship company is entirely analogous to the ownership acquired by prescription creating a title to real estate, which title cannot be divested upon proceedings prosecuted by authority of a limitation statute enacted after the prescriptive rights had matured and culminated in ownership.

Campbell v. Holt, 115 U. S. 620.

The debt having become entirely extinguished, the same could not operate "as a consideration for a new assumpsit." In the case of the ordinary general limitation statute, the mere lapse of time does not operate to destroy the right or extinguish the debt, but simply deprives the creditor of the means of enforcing his claim against the wishes of the debtor. The prescribed period may run, and later the Congress or legislature enact a statute rendering available a remedy to enforce the existing right, and on the authority of the Campbell case *supra* such statute is valid, no taking of property being involved but merely a depriving one of his defense, which right of defense does not amount to a vested property right. To permit a recovery on claims that had become extinguished prior to the enactment of

the Transportation Act under the authority of subparagraph (f) of Section 206 would be to violate the Fifth Amendment and would constitute a taking of the property of the Steamship Company without due process of law.

We forego further discussion of the case, but upon the Errors Assigned and returned with the writ herein, which Assignments of Error are for convenient reference appended hereto, and upon the points urged in our opening brief and herein in the consideration thereof, respectfully submit that the judgment of the Circuit Court of Appeals should be reversed.

ARTHUR C. SPENCER,
Attorney for Plaintiff in Error.

## ERRORS ASSIGNED AND RETURNED WITH THE WRIT HEREIN

(Page 164 et seq., Transcript)

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause and in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to-wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Eleven Thousand Three Hundred Eighty and Sixty-nine One-hundredths ($11,380.69) Dollars, with interest as in said judgment stated, and the further sum of Two Thousand ($2,000.00) Dollars as attorney's fees in the District Court, and the further sum of One Thousand ($1,000.00) Dollars attorney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the 5th day of June, 1922, in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in

favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to-wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint. (The demurrer is found at page 21 of the transcript and challenges the complaint on the following grounds: (1) That the court was without jurisdiction on the subject matter of the action; (2) that the complaint did not state facts sufficient to constitute a cause of action; and (3) that the action on claims arising prior to January 1, 1918, was not commenced within the time limited by the Interstate Commerce Act nor within the time limited by the 1920 Oregon Laws.)

(b) Assignment of Error Number Seven charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in

failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates. (Page 121 of Transcript.)

(c) Assignment of Error Number Eight wherein error is charged in overruling the objection to conclusion of law Number Two, in which the plaintiff in error, as defendant in the court below, was held liable to shippers on bills of lading and contracts of carriage and collection of charges during the time the vessels were requisitioned by and under Charter Two of the United States Shipping Board and all operations of said vessels were for account of said Shipping Board, between October 20th and December 28, 1917. (Page 122 of Transcript.)

(d) Assignment of Error Number Nine, wherein error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved. (Page 122, Transcript.)

(e) Assignment of Error Number Thirteen, wherein error was charged in holding and finding that Portland was a point intermediate to North Portland upon the line or route between San Francisco, California, and North Portland, Oregon, over the line of The San Francisco and Portland Steamship Company and the

Oregon-Washington Railroad & Navigation Company at the time of the movement of the respective shipments. (Page 123, Transcript.)

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206c of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below, because

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

## IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against plaintiff in error.